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**INSANITY AS A DEFENSE
IN CRIMINAL LAW**

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INSANITY AS A DEFENSE IN CRIMINAL LAW

BY HENRY WEIHOFEN

SCHOOL OF LAW, UNIVERSITY OF COLORADO

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PREFACE

IN 1928, under a grant from the Legal Research Committee of the Commonwealth Fund, the faculty of the University of Chicago Law School undertook a study of the state of the law governing insanity as a defense to crime, and committed to the writer the task of gathering and preparing the material.

In order that the work might be as accurate and complete as possible, the attempt has been made to find and read all the American cases on the subject that have been reported, as well as leading and representative English cases. All the current English and American legislation on the subject has also been studied, and in connection with a few questions where a broader view seemed desirable, continental law has been cited by way of comparison.

The Commonwealth Fund did not attempt to exercise any control or supervision over the preparation of the book, and therefore cannot be understood to sanction or approve any specific program or opinion which it may suggest. In so far as the writer does presume to express approval of any particular view, he speaks merely for himself, and not in the name either of the Commonwealth Fund or of the faculty of the University of Chicago Law School.

The writer wishes to express his appreciation of the confidence reposed in him by the University of Chicago Law School faculty, and the guidance and assistance they have rendered. He is especially grateful to Professor Kenneth C. Sears, who has devoted much of his time throughout the course of the work to reading the manuscript and offering suggestions for its improvement, and to Dean Harry A. Bigelow, whose efforts have helped to make its publication possible.

H. W.

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CHAPTER I

INTRODUCTION

§1. WHAT IS WRONG WITH THE LAW?

PROBABLY no branch of the criminal law has been the subject of so much criticism and controversy as the defense of insanity. It is charged that the rules of law governing insanity as a defense to crime are vague and confused; that in so far as these rules are clear, they are clearly unsound, in that they are based upon notions of mental disorder discredited by modern science; and that the procedural machinery for trying cases where this defense is raised is inefficient and blundering in its results.

Ambiguity and Confusion of the Law. That the substantive rules of criminal law governing insanity are ambiguous and confused is testified to by the constant stream of cases in which these rules are disputed. What, for example, is the law upon that much-discussed subject, the legal "test" of responsibility? It is upon this question that English and American courts, legislators, and legal writers have spent the greatest efforts to attain clarity and uniformity in the law. As long ago as 1800, the brilliant Lord Erskine, in his argument as counsel in the trial of Hadfield, tried to lay down a universal test of responsibility in cases where the defendant suffered from mental disease. Delusion, he said, in cases where there is no frenzy or raving madness, is the true character of insanity. In 1843, following the sensational trial of Daniel M'Naghten for the assassination of the secretary to Sir Robert Peel, the House of Lords resorted to the extraordinary expedient of asking the opinion of all the judges of England upon the law relating to insanity as a defense to crime. In the famous Opinion of the Judges, it was said that knowledge of right and wrong as to the act charged was the test to be applied. At about the same time, two of the ablest of early American judges, Chief Justice Shaw of Massachusetts and Chief Justice

But even that was before the science of psychiatry was born. It was a time when Francis Gall's fantastic theory of phrenology was at the height of its popularity. According to this doctrine, each function of the mind was localized in its own corner of the brain, and the phrenologist could measure a man's "ambition," "amativeness," "docility," or what not, by measuring the respective bump on the skull. Thus, the theory conceived of the brain as a bundle of functions, each working independently. The Opinion of the Judges reveals that they accepted a similar view, for they refer constantly to a person suffering from delusion, "and not in other respects insane." We know today that no such person exists. The mind is a whole, and delusions are a symptom of the existence of some more fundamental disturbance. There is no such thing as a man suffering from "partial delusions only, and not in other respects insane." Yet it is this discarded fanciful brain-child of an eccentric Viennese physician of a hundred and thirty years ago that underlies the cornerstone of our law governing the criminal responsibility of the mentally unsound.

Inefficient Procedure. The procedure by which the law attempts to fix the responsibility or irresponsibility of a person pleading insanity has been even more severely criticized than the substantive law. The judicial machinery for trying the issue is charged with being cumbersome and expensive, and withal, too frequently mistaken in its results. Public opinion is almost unanimous in the belief that an alarming number of criminals are escaping punishment by means of the "insanity dodge," and that they are doing so because shrewd lawyers, with the help of willing experts, can so manipulate matters at the trial as to de-

and an apron was put before the girl's eyes; but instead of the witch's hand, another person's hand was taken to touch the girl, who thereupon shrieked out as she used to do. The gentlemen returned and declared to the court they believed the whole was an imposture. Notwithstanding this, the witch was found guilty, and the judge and all the court were fully satisfied with the verdict, and awarded sentence accordingly."

lude the jury into believing that the defendant is insane. Medical authorities insist that not only are some sane criminals escaping conviction by false pleas of insanity, but that even more often insane men are convicted, imprisoned, and discharged, without their condition ever being discovered. "The memorials of our jurisprudence are written all over with cases in which those who are now understood to have been insane have been executed as criminals."³

§2. PURPOSE AND PLAN OF THIS BOOK

It is not the purpose of this book to propose a cure-all for the law's deficiencies. Before it is possible to determine wherein the law needs improvement, it is necessary to know what the law is, and the purpose of this volume is to state the law, just as concretely and as completely as possible.

In order to say precisely what the present state of the law is, it was felt necessary to adopt what is perhaps an innovation in legal writing. Instead of being content to collect and classify all the rules which courts at one time or another have followed, we shall, whenever possible, state the exact number of jurisdictions which support each rule discussed. A statement that the rule governing the test of responsibility, or the burden of proof, or what not, is thus and so, is in this field of law almost worthless—there are some cases supporting almost every possible rule. The important thing is to find how many jurisdictions support each of these conflicting rules. Only in this way is it possible to get a complete picture of the existing state of the law, and to know which rules are universally accepted, which represent the majority and which the minority view, and which are mere stray and exceptional decisions. An attempt has been made to cite all reported cases bearing on the main points discussed. On related points, incidentally mentioned, only important or representative cases have been selected for citation.

³ Bishop, *Criminal Law* (9th ed., 1923), vol. i, §390.

Scientific Aspect of the Rules of Law. A second important need in presenting a complete picture of the existing state of the law is a clear view of the scientific background of the legal rules we are discussing. These rules do not operate *in vacuo*; they must be applied to actual cases of persons suffering from various types and degrees of psychosis, neurosis, and psychopathosis. Whether a person who commits an antisocial act while suffering from any of these forms of mental disorder is to be punished or not is distinctly a legal question; nevertheless, there can be no sound rule of law on this subject which disregards the fund of knowledge of the mind which science has made available, and which conflicts with the facts established by psychopathology. "That cannot be a fact in law, which is not a fact in science; that cannot be health in law, which is disease in fact."⁴

Our purpose is not to write a critique on the law, but it is essential to a complete knowledge of what the law is to know whether any given legal principle is based upon a sound conception of mental science, or upon theories and beliefs which have been discredited and discarded by those most competent to speak on the subject. We shall therefore try to keep in mind the scientific aspect of the subject by referring occasionally to the views of authorities in forensic psychiatry upon the soundness of the various rules of law discussed.⁵

Outline to be Followed: The Tests of Responsibility. The method of approach, and the division of the subject into chapters, will follow practical rather than logical considerations. The first problem to be dealt with will be the legal tests of responsibility, to which the next two chapters will be devoted. This question is placed first simply because it is the one which law-

⁴ Doe, J., in *Boardman v. Woodman* (1866) 47 N.H. 120, 150.

⁵ On the scientific and sociological aspects of the subject, the writer knows of no more searching and helpful study than Dr. S. Sheldon Glueck's *Mental Disorder and the Criminal Law*, published in 1925 by Little, Brown and Company.

yers think of first in connection with the problem of insanity as a defense to crime. It is the one about which most of the discussion in this field has centered, and to begin with a discussion of some other phase of the subject would, for many readers, seem to leave this question in suspension.

Burden of Proof. Chapter IV will deal with the question of who holds the ultimate burden of proof—whether the defendant is required to convince the jury that he was insane and irresponsible at the time of the act charged, or whether the prosecution must prove sanity and responsibility as an element of guilt, and if the former, what quantum of evidence the defendant must produce to satisfy the burden. As a matter of fact, we shall see that both rules have some support, and the inquiry will be, rather, which of the two is the majority rule, and how many jurisdictions support each.

Expert and Non-Expert Witnesses: Admissibility of Evidence. Chapter V deals with the rules governing the testimony of expert and non-expert witnesses and the admissibility of various kinds and facts of evidence. The first of these topics, the testimony of experts, is one of the most mooted questions in the criminal law relating to insanity, and indeed, in the whole field of law, for it is as much a problem in civil as in criminal cases. Who is qualified to testify as an expert? What basis must he have for his opinion? Is a personal examination necessary, or may the witness give an opinion concerning the mental condition of a person whom he has never examined or perhaps never even seen? What are the rules governing that notorious source of controversy—the hypothetical question? These are some of the questions regarding expert testimony which we must answer.

The testimony of non-experts also presents a question of importance. Are laymen, having no special knowledge or experience in mental disease or defect, ever qualified to express an opinion upon the “sanity” or “insanity” of another person? Cer-

tainly no court would listen to opinion evidence of laymen as to whether a certain person was afflicted with tuberculosis or cancer. Is there a different rule regarding mental disease, and if so, why?

The admissibility of various facts of evidence is, of course, distinctly a legal question, and yet, even here, the soundness of the rules of law may depend upon their soundness in psychiatry. For example, where the question at issue is whether a defendant was sane and responsible at a certain date, is it admissible to show what his condition was prior and subsequent to that date? The answer to this purely legal question must depend upon the purely medical question—does the prior and subsequent condition of a person throw any light upon his condition at the specific time inquired of? As a matter of fact, certain mental disorders, such as feeble-mindedness, are known to be congenital, and others, such as paresis, are known to be the product of long continued development. On the other hand, some forms of mental disorder, such as hysteria, may appear suddenly. If it is alleged in a case that the defendant at the time of the crime was suffering from feeble-mindedness or paresis, it is obviously important to show whether there had been any previous manifestations of such disorder, for such a disturbance does not arise overnight. A rule excluding evidence of prior mental condition in such a case as irrelevant would be bad law, because bad psychiatry.

Survey of Statutes Governing Procedure. The rules governing the procedure by which criminal trials involving the question of insanity are tried, have been discussed as fully in this volume as the substantive law on the subject. Chapter VI is entitled Pleading and Procedure, and deals with the manner in which the defense of insanity is pleaded, whether specially or under the general issue; how the issue is tried, whether in a separate proceeding or as part of the trial of guilt or innocence; what is done with a defendant if the jury finds him "not guilty by rea-

on of insanity"; and how a person committed to an insane institution upon criminal proceedings may be discharged, if he later recovers his reason.

These procedural questions have received much less serious study than they deserve. Lawyers and legal writers have concerned themselves primarily with the ethico-legal and rather metaphysical question of "responsibility," and the "tests" which should be applied for determining it. As a practical matter, however, the "tests" about which so much legalistic discussion has centered are probably of minor importance. Their sole purpose is to furnish the jury with a measure by which to determine whether the defendant's mental condition should relieve him from accountability or not. Yet is there anyone who seriously thinks that the jurymen in even an appreciable minority of cases decide the question of sanity or insanity by a dispassionate and judicial application of the test given them by the judge? Whether a jury will return a verdict of "guilty" or "not guilty by reason of insanity" depends primarily upon the dramatic quality of the offense charged—whether it was a brutal and atrocious act arousing public indignation or repugnance, or an act arousing public sympathy or condonation; upon the personality and appearance of the defendant, his lawyer, and the prosecutor; upon the nationality, religion, or color of the defendant and the jurymen; upon wholly extraneous matters, such as the existence of a recent "crime wave," and a resulting belief by the jury in the need for drastic punishments; upon a thousand and one legally irrelevant facts appealing to the jury's "common sense"; and—usually less important than any of these—upon the instructions of the court.

For this reason, the procedure by which these cases are tried is probably of more practical importance than such questions as the proper legal test of responsibility. Any reform in the law will probably come—and indeed, is already coming—through statutory reform in procedure, rather than through judicial re-

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CHAPTER II

THE LEGAL TESTS OF IRRESPONSIBILITY

§1. SUMMARY OF EXISTING TESTS

OF all the problems involved in the subject of mental unsoundness as a defense to crime, the greatest difference of opinion and the most discussion on the part of courts and commentators has centered about the legal "tests" of insanity—i.e., the degree of mental unsoundness which must be shown to excuse a defendant from criminal responsibility.

Obviously, not every form of mental unsoundness will render a person irresponsible. It is sometimes stated by text writers and courts, and frequently in statutes, that a person who is "lunatic" or "insane" is not capable of committing crime.¹ Such statements and statutes, however, use the terms "lunatic" and "insane" in a loose sense, and they must not be understood to mean that every person is held incapable of committing crime who is in any degree mentally diseased or defective. It is only those who are so disordered as to come within the "test" established by the law

¹ 3 Coke Inst. 4; 4 Bl. Comm. 24; *State v. Crawford* (1873) 11 Kans. 32, 43; *Adair v. State* (1911) 6 Okla. Crim. 284, 118 Pac. 416. In most of the western states, a statutory provision is commonly found that: "All persons are capable of committing crimes except . . . [among others] . . . idiots . . . lunatics and insane persons." Ariz. Rev. Code (1928), §4489; Cal. Penal Code (1931), §1367; Idaho Comp. Stat. (1919), §8090; Mont. Rev. Codes (1921), vol. iv, §10729; Nevada Comp. Laws (1929), §9952; N. Dak. Comp. Laws (1913), §9207; S. Dak. Comp. Laws (1929), vol. i, §3583; Utah Comp. Laws (1917), §7915.

Four other states provide that "an idiot" or "a lunatic or insane person, without lucid intervals, shall not be found guilty of any crime or misdemeanor. . . ." Ark. Dig. Stat. (*Crawford & Moses*, 1921), §§2302, 2298; Colo. Comp. Laws (1921), §§6638, 6637; Ga. Code (1926), Penal Code, §§36, 35; Ill. Rev. Stat. (*Smith-Hurd*, 1931), chap. 38, pars. 621, 623.

Texas and Oklahoma provide that no "act done in a state of insanity" can be punished as an offense. Tex. Complete Stat. (1928), Penal Code, art. 34; Okla. Stat. (1931), §3211.

in each jurisdiction that are excused from criminal responsibility on the ground of insanity.² What the test for irresponsibility should be is a question upon which authorities differ.

The law in this country (except in New Hampshire) can be summarized as follows:

A person is not criminally responsible for an offense if at the time it is committed he is so mentally unsound as to lack

1. Knowledge that the act is wrong, or
2. (In seventeen states) will power enough to resist the impulse to commit it.

The first part of this rule states the so-called "right and wrong test." This part of the rule is law everywhere; and it is the *sole* test of irresponsibility in England³ and in twenty-nine American states.⁴ The wording of the rule varies considerably; in fully half the cases it is stated that to be excused, a defendant must be so disordered as not to know the "nature and quality" (some-

² U.S. v. Holmes (1858) Fed. Cas. No. 15,382, 1 Cliff. 98; State v. Arnold (1909) 79 Kans. 533, 100 Pac. 64; State v. Paulsgrove (1907) 203 Mo. 193, 101 S.W. 27; People v. Coleman (1910) 198 N.Y. 166, 91 N.E. 368; State v. Jones (1926) 191 N.C. 753, 133 S.E. 81; Lee v. State (1925) 30 Okla. Crim. 14, 234 Pac. 654; Taylor v. Comm. (1885) 109 Pa. 262; *Ex parte* McKenzie (1930) 116 Tex. Crim. 144, 28 S.W. (2d) 133. An Oklahoma case seems *contra*: Adair v. State (1911) 6 Okla. Crim. 284, 118 Pac. 416 (holding that statute excusing persons suffering from "insanity" includes "all unsound, diseased and deranged conditions of the mind and intellect"). This decision is ignored in subsequent Oklahoma cases. Alberty v. State (1914) 10 Okla. Crim. 616, 140 Pac. 1025; Roe v. State (1920) 17 Okla. Crim. 587, 191 Pac. 1048.

³ Rex v. Quarmby (1921) 15 Crim. App. 163; Rex v. True (1922) 16 Crim. App. 164.

⁴ Arizona, California, Florida, Georgia, Idaho, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin. In five of these states (Minnesota, New York, North Dakota, Oklahoma, and South Dakota) the right and wrong test is established by statute.

For cases, see Digest, p. 109.

times "nature and character," "consequences," etc.) of the act, or if he did know it, that he did not know that it was wrong.⁵

The second part states the "irresistible impulse test," which is added as a second test of irresponsibility in seventeen states and in the District of Columbia.⁶ In these jurisdictions, a person is excused if he is incapable of knowing the wrongfulness of the act, or, even though he does know that it is wrong, if he is incapable of controlling the impulse to commit it.

In one state, New Hampshire, the court has rejected both of these tests, and has adopted the rule that:

There is no legal test of irresponsibility by reason of insanity. It is a question of fact for the jury in each case whether defendant had a mental disease, and if so, whether it was of such character or degree as to take away the capacity to form or entertain a criminal intent.⁷

In Rhode Island, the court has never passed upon the question of the legal test.

Time When Tests Are Applied. In all states, the question is always whether the defendant was so insane as to come within the test adopted in the particular jurisdiction, at the time of the commission of the offense. Evidence of prior and subsequent insanity may be admitted, of course, as tending to throw light upon the defendant's mental condition at the time of the act,⁸ but the question at issue is always his responsibility or irresponsibility at the time of the act.

⁵ See *post*, p. 35.

⁶ Alabama, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Montana, New Mexico, Ohio, Vermont, Virginia, Wyoming. Of these, Louisiana, Massachusetts, and New Mexico are doubtful. The United States Supreme Court also seems to have adopted the irresistible impulse test.

For cases, see Digest, p. 109.

⁷ See *post*, p. 79.

⁸ See chap. v, p. 248 *et seq.*

Delusions. Although the tests above are always stated as general tests, applicable to all forms of mental disorder, it is not unusual for courts to lay down different, and sometimes not wholly consistent rules, in cases where it is claimed the defendant committed the act under an insane delusion. These special delusion tests will be considered later.⁹

§2. HISTORICAL DEVELOPMENT OF THE RIGHT AND WRONG TEST

The right and wrong test, which constitutes the sole test of responsibility in England and in the majority of American states, and which, supplemented by the irresistible impulse test, is also used in every other state which has passed upon the question except New Hampshire, is a product of historical development. The leading case is still the Opinion of the Fifteen Judges of England, delivered in 1843, following M'Naghten's Case, and a discussion of that famous opinion, and of some of the cases preceding it, is essential to any consideration of the present law on the subject. Only the barest sketch of the English law up to 1843 is here attempted. Much fuller reviews of the subject have already been written.¹⁰

Early English Commentators. Insanity did not become a defense to crime in England until the beginning of the fourteenth century,¹¹ and the authorities on the subject prior to the seventeenth century are so general in their terms that they can be regarded as little more than "antiquarian curiosities."¹² The early

⁹ See p. 69 *et seq.*

¹⁰ An exhaustive history of the law of insanity is given in Wharton and Stillé's *Medical Jurisprudence* (5th ed., 1905), vol. i, chap. xxvi, p. 504. The same subject is also reviewed, with greater criticism of the soundness of the historic authorities, from the viewpoint of psychiatry, by Dr. S. Sheldon Glueck, in his work on *Mental Disorder and the Criminal Law* (1925), chap. v.

¹¹ Glueck, *op. cit.*, p. 125.

¹² Stephen, *History of the Criminal Law of England* (1883), vol. ii, p. 150.

institutional writers, Bracton,¹³ Littleton,¹⁴ and Fitzherbert,¹⁵ did not treat of insanity as a defense to crime at all, and their discussion of it as an excuse to civil liability is fragmentary. Coke, writing in the seventeenth century, discussed the criminal liability of persons *non compos mentis*, but only in a casual manner. He laid down no legal test for the degree or type of insanity

¹³ Bracton, writing in the thirteenth century, was an ecclesiastic, and a Roman-law, rather than a common-law, writer. His contribution to the law of insanity is contained in two statements found in his work, *De Legibus* (1640), lib. iii, fol. 100, and lib. v, fol. 420b. These two statements are usually combined by legal writers, and Bracton cited for the rule that: *Furiosus non intelligit quod agit, et animo et ratione caret, et non multum distat a brutis*—an insane person is one who does not know what he is doing, and is lacking in mind and reason, and is not far removed from the brutes. The influence of this definition is seen in later authorities.

¹⁴ Littleton wrote in the fifteenth century. In dealing with "Discents," he said that a man "which is of non sane memory, that is to say, in Latin, *qui non est compos mentis*," cannot set that fact up as a defense, for a man shall not by his plea be permitted to disable his own person; but his heir may set up this defense. Coke, *Litt.*, p. 246a, §405. This is called Littleton's doctrine of "non-stultification."

¹⁵ Fitzherbert is usually quoted in connection with the "counting twenty pence test." Writing early in the sixteenth century, he defined an idiot as "such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss. But if he have such understanding that he know and understand his letters, and do read by teaching of another man, then it seems he is not a sot or natural fool." *The New Natura Brevium* (8th ed., 1755), p. 532. To this, Staundforde added this surprisingly naïve test: "That if he bee able to bebeat eyther soone or daughter, hee is no foole." *Kinges Prerog.* (1567), fol. 35.

The first part of Fitzherbert's statement has usually been quoted alone, as a test of idiocy. It seems clear, however, that Fitzherbert meant it as an illustration, and not as a conclusive test. Furthermore, the entire quotation was made not with reference to criminal responsibility, but concerning the writ *De Ideota inquirendo*. Fitzherbert's only mention of the criminal liability of insane persons is in the following sentence: "He who is of unsound Memory, hath not any Manner of Discretion; for if he kill a Man, it shall not be Felony, nor Murder, nor he shall not forfeit his Lands or Goods for the same, because it appeareth that he hath not Dis-

necessary to excuse one from crime, but held merely that "no felony or murder can be committed without a felonious intent and purpose"; that a madman does not know what he is doing, and is lacking in mind and reason, "and therefore he cannot have a felonious intent."¹⁶

The first writer to draw a distinction between the insanity which will excuse from criminal responsibility, and that which will not, was Lord Hale. Like Coke, Hale, writing in the latter half of the seventeenth century, also made the concept of criminal intent his starting point in discussing the criminal incapacity of the insane.¹⁷ In speaking of idiocy, he pointed out that legal tests, "though they may be evidences," cannot, in the very nature of the subject, be conclusive, "for *ideocy* or *not* is a question of fact triable by jury, and sometimes by inspection."¹⁸ Nevertheless, in distinguishing between "total insanity," which he said negated criminal intent, and "partial insanity," which he claimed did not, Hale himself laid down a test; for total insanity, he said, "the best measure that I can think of is this: such a person as labouring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason, or felony."¹⁹ This test was seized upon by judges, and became known as the "child of fourteen years test."

The next great writer on the criminal law was Hawkins, in the late eighteenth century. The test he laid down for irresponsibility is contained in this sentence:

. . . Those who are under a natural disability of distinguishing
cretion; for if he had Discretion he should be hanged for the same, as an
Infant who is of the Age of Discretion, who committeth Murder or
Felony, shall be hanged for the same." *Nat. Brev.* 466. The only "test" of
criminal responsibility that Fitzherbert seemed to apply, therefore, was
whether the person had "discretion."

¹⁶ *Beverley's Case* (1603) 2 Coke's Rep. 568, 571, quoting Bracton's test, *supra*, note 13.

¹⁷ 1 Hale P.C. 14.

¹⁸ *Ibid.*, p. 29.

¹⁹ *Ibid.*, p. 30.

tized delusions that, like the Savior, he was to sacrifice himself for the world's salvation; he therefore shot at the king, that by the appearance of crime, he might be executed, and so perform the sacrifice he felt divinely called to make. He was defended by Lord Erskine, a brilliant criminal lawyer, who, in his address to the jury, introduced a new concept into the law—namely, the presence of delusion as a test of irresponsibility. Erskine accepted the principles of Coke and Hale as “the most revered authorities of the law,” but he questioned the interpretation of them which had been made in Earl Ferrer's Case, and which was insisted upon by the Crown counsel in this case, namely, that these authorities required a total deprivation of memory to protect a man from criminal responsibility. “If a *total deprivation of memory* was intended by these great lawyers to be taken in the *literal* sense of the words,” he declared, “then no such madness ever existed in the world.”²⁸

Erskine admitted that there are extreme cases, where “the human mind is stormed in its citadel, and laid prostrate under the stroke of frenzy.” But such cases, he pointed out, are rare and can present no judicial difficulty. But “in other cases, reason is not driven from her seat, but distraction sits down upon it along with her, holds her trembling upon it, and frightens her from her propriety.” Such persons, said Erskine, are subject to delusions. In some cases, these delusions are so terrific as wholly to overpower the faculties; in others, the delusions are more circumscribed, yet the disordered imagination still holds the most uncontrollable dominion over reality and fact, “and these are the cases which frequently mock the wisdom of the wisest in judicial trials, because such persons often reason with a subtlety which puts in the shade the ordinary conceptions of man-kind; the conclusions are just, and frequently profound; but the premises from which they reason, when within the range of the malady, are uniformly false.”

²⁸ 27 How. St. Tr. 1312.

"Delusion, therefore," Erskine concluded, "where there is no frenzy or raving madness, is the true character of insanity."²⁹

Without waiting to hear all the witnesses for the defense, Lord Kenyon stopped the trial, saying, "with regard to the law, as it has been laid down, there can be no doubt upon earth," and asked the jury whether they would not find the prisoner mentally irresponsible.³⁰

What the legal test of irresponsibility was, that the court in Hadfield's Case applied, is not clear. Probably the fact is, as Judge Doe said, that "Hadfield's acquittal was not a judicial adoption of delusion as the test in the place of knowledge of right and wrong; it was probably an instance of the bewildering effect of Erskine's adroitness, rhetoric and eloquence."³¹

Twelve years after Hadfield's Case, came the trial of Bellingham,³² a defendant who, believing that the Government owed him large sums of money, finally shot and killed a treasury official who had refused him satisfaction. Sir James Mansfield, the presiding judge in the case, charged the jury as follows:

There was a . . . species of insanity in which the patient fancied the existence of injury, and sought an opportunity of gratifying revenge by some hostile act. If such a person were capable, in other respects, of distinguishing right from wrong, there was no excuse for any act of atrocity which he might commit under this description of derangement. . . . The single question was whether, when he committed the offense charged upon him, he had sufficient understanding to distinguish good from evil, right from wrong, and that murder was a crime not only against the law of God, but against the law of his Country.³³

²⁹ *Ibid.*, pp. 1313-1314.

³⁰ *Ibid.*, p. 1353.

³¹ *State v. Pike* (1869) 49 N.H. 399, 434.

³² Collinson, *Lunacy* (1812), p. 636. This case has been called "the most notorious in the medico-legal annals of England," because of the "indecent haste" with which Bellingham was "railroaded" to his doom. Eight days after the crime he was dead. Wharton and Stillé, *op. cit.*, p. 529.

³³ Collinson, *op. cit.*, p. 672. Mansfield's opinion was cited with ap-

Thus the right and wrong test, which had been practically disregarded in *Hadfield's Case*, was here stated as the sole test of responsibility, and the presence of delusion, emphasized as of prime importance by *Erskine in Hadfield's Case*, was here held to be of no effect except in so far as it proved incapacity to distinguish right from wrong.

Only one more case prior to that of *M'Naghten* need be considered. In 1840, one Oxford was tried for shooting at Queen Victoria.⁸⁴ Lord Chief Justice Denman told the jury that "if some controlling disease was, in truth, the acting power within him, which he could not resist," the defendant would not be responsible. He then attempted to make the rule more specific, and said:

The question is, whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime.⁸⁵

The phrase here used, "the nature, character, and consequences of the act," was later adopted by the Opinion of the Judges following *M'Naghten's Case*, and to this day is very generally stated as a part of, or as a supplement to, the right and wrong test. Also, the use of the words "controlling disease . . . which he could not resist," suggests the irresistible impulse test.

M'Naghten's Case. The first reason for the important position

proval by Lord Lyndhurst, in charging the jury in *Rex v. Offord* (1831) 5 Car. & P. 168, where it was said: "The question was, did he know that he was committing an offense against the laws of God and nature?" Both *Bellingham* and *Offord* seem to have been afflicted with an identical type of delusional mental disorder, but *Bellingham* was convicted, and *Offord* acquitted on the ground of insanity.

⁸⁴ *Reg. v. Oxford*, 9 Car. & P. 525.

⁸⁵ *Ibid.*, pp. 546, 547.

which M'Naghten's Case³⁶ has obtained in the development of the law, was the popular interest aroused by the sensational facts of the case. Daniel M'Naghten had shot and killed Drummond, private secretary to Sir Robert Peel, believing him to be Peel. The defendant was laboring under an insane delusion that he was being hounded by his enemies, and that Peel was one of them. The defense made was insanity, and the medical evidence in the case was in substance that the prisoner was affected by morbid delusions, which carried him beyond the power of his own control, and left him with no perception of right and wrong; and that he was not capable of exercising any control over acts which had connection with his delusion. The jury found him "Not guilty, on the ground of insanity."

The prestige of the deceased and the popular interest in the case caused "this verdict, and the question of the unsoundness of mind which would excuse the commission of a felony of this sort," to be made the subject of debate in the House of Lords, where it was determined "to take the opinion of the Judges on the law governing such cases."³⁷

In 1843, five questions were accordingly put to the fifteen judges of England regarding the existing law of insanity. The questions and the answers of fourteen of the judges (Mr. Justice Maule delivering a separate opinion) were as follows:

Question I. What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

Answer I. Assuming that your Lordships' inquiries are confined

³⁶ (1843) 10 Clark & Fin. 200.

³⁷ *Ibid.*, p. 202.

to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land.

The fourth question seems to refer almost to the same situation as the first, and so, with its answer, may be stated next:

Question IV. If a person under an insane delusion as to existing facts commits an offense in consequence thereof, is he thereby excused?

Answer IV. The answer must of course depend on the nature of the delusion: but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury on his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The second and third questions the judges considered together:

Question II. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

Question III. In what terms ought the question to be left to the

jury, as to the prisoner's state of mind at the time when the act was committed?

Answers II and III. As these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be that the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered on the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable, and the usual course therefore has been to leave the question to the jury whether the accused had a sufficient degree of reason to know he was doing an act that was wrong: and this course we think is correct, accompanied with such observations and explanations as the circumstances of each case may require.

The fifth question and answer dealt with the admissibility of expert testimony, and need not be considered here.

Mr. Justice Maule, writing separate answers, stated: "I should

have been glad if my learned brethren would have joined me in praying your Lordships to excuse us from answering these questions," because, first, "they do not appear to arise out of, and are not put with reference to, a particular case, or for a particular purpose, which might explain or limit the generality of their terms"; secondly, because no argument had been heard on the subject; and thirdly, from a fear "that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the Judges may embarrass the administration of justice, when they are cited in criminal trials." In answering the questions, Mr. Justice Maule set up the knowledge of right and wrong as the sole test of responsibility.⁸⁸

The Answers of the Judges may be summarized as laying down two rules regarding the responsibility of persons setting up insanity as a defense to crime:

1. "The jury ought to be told in all cases that . . . to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong."

This rule was amplified with the explanations that:

a. The knowledge of right and wrong referred to means with respect to the very act charged, rather than in the abstract.

b. It also refers not merely to legal right and wrong, but rather (or also?) to moral right and wrong.

2. Where a person "labours under partial delusions only and

⁸⁸ "To render a person irresponsible for crime on account of unsoundness of mind," said Justice Maule, "the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong." (1843) 10 Clark & Fin. 205.

is not in other respects insane," and commits an offense in consequence thereof, "he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real."

How this second rule fits in with the first is not made clear. The first rule, the judges said, should be given "in all cases." The second rule, it therefore seems, is not to be substituted for the first, where the defense is delusional insanity, but is at most, a supplemental rule. Indeed, the Opinion of the Judges does not indicate that the second was meant as a distinct rule at all. The answer to the first question says that a person "labouring under partial delusion" "is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law." And the answer to the fourth question, that such person "must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real," was evidently not considered as inconsistent with the first answer. The application of this separate test for delusion in the American cases will be considered later.³⁹

Criticism of the Tests in M'Naghten's Case. It is no part of our task to pass upon the soundness or the practicability of the tests laid down in the Opinion of the Judges. Nothing more is attempted here than to list the most important objections which have been urged:

1. The answers "do not form a judgment upon definite facts proved by evidence," but are mere answers to questions which the judges were probably under no obligation to give.⁴⁰
2. "The questions asked the judges were circumscribed and were intended to cover only the psychoses in which delusional

³⁹ See p. 69 *et seq.*

⁴⁰ Stephen, *History of the Criminal Law of England* (1883), vol. ii, p. 154. Sir James Stephen probably had a wider knowledge of forensic

manifestations are the most striking symptoms, especially paranoia; moreover, the judges knew quite well that the questions referred to the case of M'Naghten, a paranoiac with an apparently more or less circumscribed delusional system. Hence the extension of the tests to cases of mental disorder which were not dreamed of in the judges' philosophy is unwarranted, even if the legal authoritativeness of the answers be granted."⁴¹

3. As a statement of the existing law, the answers ignore Hadfield's Case. Hadfield knew the nature and quality of the act with which he was charged, and that it was wrong, yet his delusional disorder was held sufficient to absolve him from responsibility.⁴²

4. Both questions and answers are befogged by verbosity. "There probably never was a series of questions," says Wharton, "embodying one single point of inquiry clothed in such redundancy and reiteration. The point at issue simply was—What was the English law, in 1843, concerning delusional lunatics who committed crimes under the influence of their delusions?"⁴³ The answers were, if anything, more verbose than the

psychiatry than any other legal commentator of his time. His discussion of the Opinion in M'Naghten's Case is one of the most searching criticisms on the subject. *Ibid.*, p. 153 *et seq.*

⁴¹ Glueck, *op. cit.*, p. 166. This criticism was also pointed out by Stephen: "The questions are so general in their terms, and the answers follow the words of the questions so closely, that they leave untouched every state of facts which, though included under the general words of the questions, can nevertheless be distinguished from them by circumstances which the House of Lords did not take into account in framing the questions." *Loc. cit.* See also Mercier, *Criminal Responsibility* (1926), chap. viii; *Hankins v. State* (1917) 133 Ark. 38, 201 S.W. 832.

⁴² This was also pointed out by Stephen, *op. cit.*, p. 159. The general form in which the questions were put, and the failure of the answers to refer particularly to any other form of insanity than that from which M'Naghten was suffering, led Stephen to conclude that "the answers can hardly have been meant to be exhaustive."

⁴³ Wharton and Stillé, *Med. Juris.* (5th ed., 1905), vol. i, p. 543.

questions. It is difficult to determine just what the judges meant to say, because of the number of times they said it. By rewording their rules in several different ways, they left the test no more uniform than it had been before.⁴⁴

5. The doctrine expounded in the answers "operates with specific psycho-pathological notions which only remotely conform to present-day psychiatric conceptions."⁴⁵

6. The conceptions of "right" and "wrong" clearly belong to ethics. As a test of criminal responsibility, they do not endure scientific criticism. "Every society has a moral code of its own, embodying rules and precepts that are *not* permanent. Things which today are considered *wrong*, tomorrow will be found on the list of customs considered right. Acts and deeds which yesterday were regarded as right,—today are attacked and prosecuted by the state, while its judicial machinery is engaged in the destruction of their very reminiscence." Ethical principles, "being in a state of continuous transformation, hardly can be used as precise criteria of legal systems and constructions."⁴⁶

Present English Law. Whatever question there may have been of the authoritativeness of the Opinion of the Judges, based as it was upon no actual case, the test there laid down has been firmly established by a long line of subsequent cases. Attempts made

⁴⁴ One of the reasons advanced in the House of Lords for taking the opinion of the judges on the question, was that advanced by Lord Brougham (see Hansard's *Debates*, vol. lxxvii, p. 732) that such an opinion "would be invaluable on no account more than this, that it would lead to more uniformity in the language they used on future occasions in charging and directing juries on this most delicate and important subject . . . they would not longer indulge in that variety of phrase which only served to perplex others, if it did not also tend to bewilder themselves, as he supposed it sometimes did; but they would use one constant phrase, which the public and all persons concerned would be able to understand." But using "one constant phrase" is exactly what the judges did not do.

⁴⁵ Brasol, *Elements of Crime* (1927), p. 297.

⁴⁶ *Ibid.*, p. 299. See also Mercier, *op. cit.*, chap. iii.

fendant had the capacity to know right from wrong in respect to the particular act charged.⁵⁶ This same rule is also found worded in a number of other ways:

a. Whether he was conscious that he was doing what he ought not to do.⁵⁶

b. Whether he had a sufficient degree of reason to know that he was doing an act that was wrong.⁵⁷

c. Whether he had capacity to distinguish right from wrong, and was conscious that the act was one he ought not to do, or was wrong.⁵⁸

d. Whether he had capacity to judge right and wrong as to the particular act, knowledge and consciousness that the act was wrong, and that he would deserve punishment for committing it.⁵⁹

has been held prejudicial error. See, for example, *Bolling v. State* (1891) 54 Ark. 588, 16 S.W. 658; *Sherman v. State* (1929) 118 Neb. 84, 223 N.W. 645.

⁵⁶ This is the form in which the test is most usually worded by the courts of California, Georgia, Mississippi, Missouri, Nebraska, Texas, and Washington. See p. 109 *et seq.* The rule is also thus worded in some cases in other states, where a different wording is more often employed: *Lauterio v. State* (1921) 23 Ariz. 15, 201 Pac. 91; *Cochran v. State* (1913) 65 Fla. 91, 61 So. 187; *State v. Carrigan* (1919) 93 N.J.L. 268, 108 Atl. 315; *State v. Leehman* (1891) 2 S.D. 171, 49 N.W. 3; *People v. Calton* (1888) 5 Utah 451, 16 Pac. 902; *Jessner v. State* (1930) 202 Wis. 184, 231 N.W. 634.

⁵⁶ The rule was so stated in an early leading case, *State v. Spencer* (1846) 21 N.J.L. 196, 201, still the leading precedent in New Jersey. See p. 131. The rule was similarly worded in two California cases: *People v. Hobson* (1860) 17 Cal. 424; *People v. M'Donnell* (1873) 47 Cal. 134.

⁵⁷ This wording, taken from *M'Naghten's Case*, has been adopted by the Florida court. *Davis v. State* (1902) 44 Fla. 32, 48, 32 So. 822; *Cochran v. State* (1913) 65 Fla. 91, 61 So. 187; *Hall v. State* (1919) 78 Fla. 420, 441, 83 So. 513.

⁵⁸ *Genz v. State* (1896) 59 N.J.L. 488, 37 Atl. 69; *Dove v. State* (1872) 50 Tenn. 348, 370; *Firby v. State* (1874) 62 Tenn. 358.

⁵⁹ This rule has been adopted in Nevada: *State v. Lewis* (1889) 20 Nev. 333, 22 Pac. 241; *State v. Hartley* (1895) 22 Nev. 342, 40 Pac. 372. And

3. Sometimes, knowledge of the nature and quality (or character, consequences, etc.) of the act is added to knowledge of right and wrong, as an element in stating the test. Thus, many cases repeat the wording used in the Opinion following M'Naghten's Case: that to be excused, it must be shown that the defendant was so mentally diseased as not to know "the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong."⁶⁰ There are also a number of variations of this wording:

a. Some cases use the wording above, except that they say "nature or quality" instead of "nature and quality."⁶¹

b. Some use "nature and possible consequences."⁶²

also in the earlier Georgia cases: *Roberts v. State* (1847) 3 Ga. 310; *Choice v. State* (1860) 31 Ga. 424, 475; *Loyd v. State* (1872) 45 Ga. 57; *Humphreys v. State* (1872) 45 Ga. 190; *Brinkley v. State* (1877) 58 Ga. 296. And has also been given in Oregon: *State v. Murray* (1884) 11 Ore. 413, 5 Pac. 55; *State v. Zorn* (1892) 22 Ore. 591, 598, 30 Pac. 317. The same wording, except that "wrong and criminal" is used instead of "wrong," is found in a few other cases: *People v. Willard* (1907) 150 Cal. 543, 554, 89 Pac. 124; *State v. Lawrence* (1870) 57 Me. 574; *Bond v. State* (1914) 129 Tenn. 75, 83, 165 S.W. 229; *Watson v. State* (1915) 133 Tenn. 198, 211, 180 S.W. 168.

⁶⁰ *People v. Kleim* (1845) 1 Edm. Sel. Cas. (N.Y.) 13; *People v. Devine* (1848) 1 Edm. Sel. Cas. (N.Y.) 594; *People v. Pine* (1848) 2 Barb. (N.Y.) 566. This rule is established in New York by statute. N.Y. Consol. Laws (Cahill, 1930), chap. 41, §1120. The rule is also stated in substantially this form in: *People v. Williams* (1920) 184 Cal. 590, 194 Pac. 1019; *State v. Klinger* (1868) 43 Mo. 127; *State v. Cooper* (1915) 170 N.C. 719, 723, 87 S.E. 50; *Webb v. State* (1879) 5 Tex. App. 596.

⁶¹ *People v. Coffman* (1864) 24 Cal. 230 (purporting to follow the rule laid down in M'Naghten's Case); *People v. Ferris* (1880) 55 Cal. 588; *State v. Williams* (1905) 96 Minn. 351, 105 N.W. 265.

⁶² *State v. Robinson* (1882) 20 W. Va. 713, 729. In Maryland and Oklahoma, the courts have phrased the rule as follows: a defendant is responsible for crime if he had capacity to distinguish between right and wrong, and to understand the nature and consequences of his act. *Spencer v. State* (1888) 69 Md. 28, 13 Atl. 809; *Deems v. State* (1915) 127 Md. 624, 96 Atl. 878; *Maas v. Terr.* (1901) 10 Okla. 714, 63 Pac. 960; *Sloan v. State* (1923) 25 Okla. Crim. 15, 218 Pac. 717; and cases cited p. 136.

rectly considered, the courts have held there is no distinction in meaning between the two phrases.^{68a} Most courts get into the habit of quoting the rule in one way, usually in the words of some local precedent, but they also use and approve other forms of phrasing the test, and very often state the rule in such a variety of ways as to make it impossible to say what form the court is really adopting as the legal test.⁶⁹

Conjunctive Wording of the Test. The form of the knowledge test which says that a person is relieved from responsibility who either does not know the nature and quality of the act, or that it is wrong, is sometimes so stated as to require the defendant to prove both that he did not know the nature, quality, etc., of the act, and that he did not know it was wrong.⁷⁰ Such statements, however, can perhaps be attributed to carelessness,

Dakota court has held that the test is "capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act." *State v. Thronson* (1922) 49 N.D. 348, 191 N.W. 628. The Oklahoma cases likewise include capacity to understand the nature and consequences of the act as part of the test. *Sloan v. State* (1923) 25 Okla. Crim. 15, 218 Pac. 717, and cases cited, p. 136.

^{68a} *Maas v. Terr.* (1901) 10 Okla. 714, 63 Pac. 960 ("knowledge of the wrongfulness of an act also embraces capacity to understand the nature and consequences of the same"); *Jessner v. State* (1930) 202 Wis. 184, 231 N.W. 634 (held, the two phrases "express exactly the same thing").

⁶⁹ This is especially true of the older cases. See, for example, the two most famous early American cases: *Comm. v. Rogers* (1844) 7 Metc. (Mass.) 500; *Comm. v. Mosler* (1846) 4 Pa. 264. For the differences of opinion as to what test was laid down in *Comm. v. Rogers*, see p. 48.

⁷⁰ The distinction between the conjunctive and the disjunctive wording of the test was pointed out in *Knights v. State* (1899) 58 Neb. 225, 78 N.W. 508, where an instruction was held erroneous which charged that the test for irresponsibility was "such a diseased condition of the mind as renders the person incapable of understanding the nature of such act and incapable of distinguishing between right and wrong with respect to such act." This conjunctive wording of the test, it was held, told the jury to acquit only if the defendant fulfilled both conditions, i.e., "only in case (1) he was at the time of the fire incapable of understanding the

for it is improbable that any court would deliberately decide that a defendant who was so deranged as to be unable to know that the act charged against him was wrong is nevertheless liable unless he was also unable to understand the nature of the act (e.g., in a murder case, that the act was one calculated to result in death). In other cases, the rule is so worded as to leave it ambiguous whether the existence of any one of the elements mentioned is sufficient to make the defendant liable, or whether the lack of any one is sufficient to make him irresponsible.⁷¹

Ambiguity of the Words Used. Almost every word in the test laid down by the judges in the opinion following M'Naghten's Case has been criticized as ambiguous, and since the same words, if not precisely the same phrasing, are used in stating the test today, the ambiguities for which that opinion has been criticized

nature of his act, and (2) that he was at the same time incapable of distinguishing between right and wrong with respect to that act." Insane persons, said the court, ordinarily comprehend the nature of their acts. "The jury . . . may have believed that the defendant applied a lighted match to the property in question, understanding well that combustion would follow, and that the store building and its contents would be reduced to ashes; and they may have refused, for that reason, to acquit him, although reasonably doubting his capacity to distinguish between right and wrong with respect to the act." This sound distinction, however, seems to have been lost in *Kraus v. State* (1922) 108 Neb. 331, 187 N.W. 895, where it was said that the test of insanity (irresponsibility) is capacity to understand the nature of the act *and* ability to distinguish between right and wrong with respect to it. This might be construed to mean that a person is not insane (i.e., irresponsible) unless he satisfies both requirements.

⁷¹ "The standard of accountability is this: Had the party sufficient mental capacity to appreciate the character and quality of the act? Did he know and understand that it was a violation of the rights of another and in itself wrong? Did he know that it was prohibited by the law of the land, and that its commission would entail punishment and penalties upon himself?" *People v. Pico* (1882) 62 Cal. 50. What is the test of responsibility under this quotation? Must the answer to all these questions be no, before the party is excused, or is it sufficient if the answer to any one is no? See also *People v. Kerrigan* (1887) 73 Cal. 222, 14 Pac. 849.

are just as prominent in the more recent judicial statements of the test.

Probably the word whose meaning has been most debated by commentators is the one which is most used, the word "wrong." All courts agree that if a person was incapable of knowing that the act was wrong, he is not responsible. But what is meant by wrong? Does it mean morally wrong, or illegal? It may make a difference, as Stephen shows in the following illustration:

A kills B knowing that he is killing B, and knowing that it is illegal to kill B, but under an insane delusion that the salvation of the human race will be obtained by his execution for the murder of B, and that God has commanded him (A) to produce that result by those means. A's act is a crime if the word "wrong" means illegal. It is not a crime if the word wrong means morally wrong.⁷²

The Opinion of the Judges is so confusing on this point that, although the question has been much discussed, it seems impossible to determine in which sense the word "wrong" was there used. In the answer to the first question, the Judges said that though suffering from delusions, a person is punishable for crime, "if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your lordships to mean the law of the land." Yet in the answer to the second and third questions, they say, "if the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction: whereas the law is administered on the principle that everyone must be taken conclusively to know it without proof that he does know it."

⁷² Stephen, *History of the Criminal Law of England* (1883), vol. ii, p. 149. Dr. Mercier has devoted a whole chapter to a discussion of the word "wrong." Mercier, *Criminal Responsibility* (1926), chap. iii.

The majority of American cases use the word "wrong" in stating the legal test without defining it in any way. A few courts have said that by "wrong" is meant moral wrong,⁷³ and this is the construction adopted in the only case in which the definition of the word was directly discussed and decided.⁷⁴ A larger number of cases use the word to mean both moral and legal wrong, stating the rule to be that if a person had reason sufficient to distinguish between right and wrong as to the particular act charged, and to understand that it was "wrong and criminal and would subject him to punishment," he is respon-

⁷³ *State v. Wetter* (1905) 11 Ida. 433, 83 Pac. 341; *Kearney v. State* (1890) 68 Miss. 233, 8 So. 292; *Smith v. State* (1909) 95 Miss. 786, 49 So. 945; *State v. Spencer* (1846) 21 N.J.L. 196; *State v. Carrigan* (1919) 93 N.J.L. 268, 108 Atl. 315; *People v. Schmidt* (1915) 216 N.Y. 324, 110 N.E. 945; *State v. Sewell* (1855) 48 N.C. 245; *State v. Harrison* (1892) 36 W. Va. 729, 743, 15 S.E. 982.

⁷⁴ *People v. Schmidt* (1915) 216 N.Y. 324, 110 N.E. 945. Judge Cardozo's opinion in this case contains a lengthy and scholarly review of the history of the legal test of irresponsibility. In the light of that history, the opinion held, the words "right" and "wrong" must be interpreted as terms of morals. The definition of irresponsibility contained in the New York Penal Code, said Judge Cardozo, was derived from the opinion following M'Naghten's Case, in which "the judges expressly held that a defendant who knew nothing of the law would none the less be responsible if he knew that the act was wrong, by which, therefore, they must have meant, if he knew that it was morally wrong." The inconsistency between the judges' answer to the first question, and the answer to the second and third, Judge Cardozo tried to reconcile by pointing out that the answer to the first question applied only to "persons who labour under such partial delusion only, and are not in other respects insane." The conflict between the two answers "is more apparent than real," because "the answer to the first question, though it seems to make the knowledge of the law a test, presupposes the offender's capacity to understand that violation of the law is wrong. It applies only to persons who 'are not in other respects insane.' . . . A delusion that some supposed grievance or injury will be redressed, or some public benefit attained, has no such effect in obscuring the moral distinctions as a delusion that God himself has issued a command. The one delusion is consistent with knowledge that the act is a moral wrong, the other is not."

sible.⁷⁵ It is not clear whether these cases mean that a defendant will be held responsible if he knew either that his act was morally wrong, or that it was contrary to law, or whether they mean that a defendant will not be held responsible unless he understood both that the act was wrong in itself and illegal. If the defendant knew that the act was morally wrong, probably no court would require proof that he also knew it was contrary to law; knowledge of the moral wrongfulness of the act is sufficient, for knowledge of the law is presumed. In Tennessee and Texas, it has been held that knowledge of the unlawfulness of the act is sufficient to render a defendant criminally responsible, and that an insane delusion that the deed was commanded by God, though known to be a violation of the temporal law, is no defense.⁷⁶ Such a rule seems to hold responsible for crime persons suffering from some of the most dangerous types of mental disorder.⁷⁷

⁷⁵ *People v. Willard* (1907) 150 Cal. 543, 89 Pac. 124; *People v. Bundy* (1914) 168 Cal. 777, 145 Pac. 537; *People v. Reid* (1924) 193 Cal. 491, 225 Pac. 859; *People v. Sloper* (1926) 198 Cal. 238, 244 Pac. 362; *State v. Mowry* (1887) 37 Kans. 369, 15 Pac. 282; *State v. Lewis* (1889) 20 Nev. 333, 22 Pac. 241; *State v. Hartley* (1895) 22 Nev. 342, 40 Pac. 372; *State v. Murray* (1884) 11 Ore. 413, 5 Pac. 55; *State v. Zorn* (1892) 22 Ore. 591, 30 Pac. 317; *Bond v. State* (1914) 129 Tenn. 75, 165 S.W. 229; *Watson v. State* (1915) 133 Tenn. 198, 180 S.W. 168; *Evers v. State* (1892) 31 Tex. Crim. 318, 20 S.W. 744; *Oborn v. State* (1910) 143 Wis. 249, 126 N.W. 737. The South Carolina court has said: "Under the law of this State, the test is mental capacity or the want of it sufficient to distinguish moral or legal right from moral or legal wrong, and to recognize the particular act charged as morally or legally wrong." *State v. Jackson* (1910) 87 S.C. 407, 69 S.E. 883.

⁷⁶ *Watson v. State* (1915) 133 Tenn. 198, 180 S.W. 168; *McElroy v. State* (1922) 146 Tenn. 442, 242 S.W. 883; *Harrison v. State* (1902) 44 Tex. Crim. 164, 69 S.W. 500.

⁷⁷ "Many insane persons have committed acts which they knew to be wrong, and of the criminality of which they were at the time fully conscious. They have been known to commit murder in order to receive the punishment of death, and therefore, they must have been conscious of the wrongfulness, or rather of the illegality, of the act which they were per-

The phrase "nature and quality" has also been attacked as ambiguous. What is meant by the "nature," and what by the "quality" of the act? Are the two synonymous, or are they not? If not, what is the difference between them? Furthermore, what is the difference in definition between these words and the other words, "character and consequences," which are sometimes added to or substituted for "nature and quality" in wording the test? The exact meaning of these words has never yet been definitely determined, either in England or in America.⁷⁸

Similar ambiguity surrounds the word "know," the key word of the test. Knowledge of the nature, quality, and wrongfulness of the act is made the sole criterion of responsibility; yet what is meant by "knowledge"? Courts often say or imply that if the defendant was aware of the opinion of mankind as to the wickedness of the act, he is responsible. On the other hand, Stephen insisted that persons so insane as not to be aware of

petrating, and must have known that they were committing an offense against the laws of man." Taylor, *Med. Juris.* (8th ed., 1928), vol. i, p. 848. See, for example, *People v. Taylor* (1893) 138 N.Y. 398, 34 N.E. 275, where the defendant, suffering from a manic-depressive psychosis, murdered a fellow convict in order "to be electrocuted."

⁷⁸ As late as 1916, the English Court of Criminal Appeal found it necessary to construe the meaning of the words, "nature and quality." *Appeal of Codere*, 12 Crim. App. 21, 27. Counsel argued that "nature" refers to the physical act, and "quality" to its moral aspect. The Lord Chief Justice held that the judges in *M'Naghten's Case* used "nature and quality" to mean only "the physical character of the act," and not to distinguish between the physical and moral aspects of the act. This seems to mean that the two words are synonymous. On the other hand, the Supreme Court of Nebraska has said: "Capacity to comprehend the nature and moral quality of an act determines criminal responsibility." *Schwartz v. State* (1902) 65 Neb. 196, 91 N.W. 190. And the Texas Court of Criminal Appeals has said: "It is almost inconceivable that a man could be sane enough to fully appreciate and know the nature and quality of an act, and yet not know whether it was right or wrong to commit such an act." *Montgomery v. State* (1912) 68 Tex. Crim. 78, 86, 151 S.W. 813. Thus it seems that the courts of Nebraska and Texas have accepted the construction of the words, "nature and quality," which the English court has rejected.

that fact are so rare as to be practically unknown, and that any person should be held not to "know that he is doing what is wrong," who was "deprived by disease affecting the mind of the power of passing a rational judgment on the moral character of the act which he meant to do."⁷⁹

§4. THE IRRESISTIBLE IMPULSE TEST

All courts agree that knowledge of right and wrong is a correct test of responsibility, and that a person so mentally disordered as to be incapable of knowing that a particular act is wrongful, should not be punished for committing it. The question upon which courts differ is whether this is the only test. The majority of states, as we have seen, hold that it is, and that a person who is capable of knowing the wrongfulness of a given act is accountable to the law if he commits it. A large minority,⁸⁰ however, hold that this test is not sufficient in all cases, and that a person who knew he was committing an act which was morally wrong and prohibited by law may nevertheless be excused from responsibility if he lacked the power of conscious volition and inhibition (freedom of will) to resist the impulse to commit it.

Legal Basis of Irresistible Impulse Doctrine. That "freedom of will" is essential to criminal responsibility is a fundamental proposition recognized by every civilized penal system in the world. "There cannot be, and there is not, in any locality or age, a law punishing men for what they cannot avoid."⁸¹ As an abstract proposition, this principle is accepted by the common law.

⁷⁹ Stephen, *History of the Criminal Law of England* (1883), vol. ii, p. 163.

⁸⁰ Seventeen states. See p. 16, note 6.

⁸¹ Judge Somerville, in *Parsons v. State* (1886) 81 Ala. 577, 2 So. 854. In *State v. Noel* (1926) 102 N.J.L. 659, 133 Atl. 274, Minturn, J., expanding on this same theme, said that since the days of Aristotle, "the crucial test of moral responsibility has been centered upon the assumption that the being under observation was in control of his will power . . . and

"All the several pleas and excuses," says Blackstone, "which protect the committer of a criminal act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will."⁸² The states which accept irresistible impulse as a defense to crime simply apply this general rule of law to the case where the lack of free will to govern and control actions is the result of mental disease.⁸³ The English and most American courts refuse so to apply it, for reasons which will be considered later.⁸⁴

Medical Basis. That there are cases in which mental unsoundness results in impulsions which are sometimes quite uncontrollable, is testified to by all psychiatrists.⁸⁵ "Some persons are assailed by most urgent desires, which they abominate, repel,

thus we have it expressed as a cardinal doctrine of the Roman law, based upon the philosophy of Seneca, Epictetus, and Marcus Aurelius, *Actus non facit reum nisi mens sit res*.

"The same essential doctrine presents the basis of responsibility under the Judaic Code, as well as under the fundamental Christian philosophy outlined by Thomas Aquinas, and that great galaxy of scholastics of the Middle Ages, beginning with Albertus Magnus and terminating with Duns Scotus, as a result of whose learned dissertations the fundamental rule of Christian philosophy has been evolved, that responsibility for moral error or crime must be based upon the possession of the three basic moral faculties, will, memory and understanding."

⁸² 4 Bl. Comm. 21.

⁸³ "Man, under the influence of disease, may know the right, and yet be powerless to resist the wrong." *Bradley v. State* (1869) 31 Ind. 492. "Volitional ability to choose the right and avoid the wrong is as fundamental in the required guilty intent . . . as is the intellectual power to discern right from wrong and understand the nature and quality of his acts." *State v. Green* (1931) 78 Utah 580, 6 Pac. (2d) 177.

⁸⁴ See p. 56 *et seq.*

⁸⁵ Kraepelin, *Lectures on Clinical Psychiatry* (1906), p. 314; Noyes, *Textbook of Psychiatry* (1927), p. 86; Paton, *Psychiatry* (1905), p. 100; White, *Outlines of Psychiatry* (1909), p. 58. Impulsions may be present in a number of disorders, as these and other writers point out. Probably the most common of the impulsive disorders are kleptomania (an irresistible impulse to steal), pyromania (a similar impulse to set fires), and dipsomania (the impulse to drink). It seems most cases of pathologic im-

and resist, to do things which are criminal, and which they abhor. They are constantly urged, by some internal irrational compulsion, to steal, to injure themselves or other people, to set things on fire, and to do other criminal acts."⁸⁶ Scientists today avoid the use of the metaphysical phrase, "freedom of will,"⁸⁷ but they agree that the power of volition and inhibition, or "conation," is necessary for mental soundness, as well as the reasoning capacity, or "cognition." The individual is not a "thinking machine," governed entirely by ethical or legal considerations of right and wrong; his mental process manifests itself in a tripartite mode—cognitive, or intellectual; conative, or volitional; and affective, or emotional.⁸⁸ Mental sanity requires a more or less healthy functioning of all three phases, and since they are so closely interconnected, "if the affection of any one of them is proved it ought to be presumed that the others are also affected until those who assert in the contrary prove their view to be correct."⁸⁹

Historical Development. The irresistible impulse doctrine is of American origin, and can be traced to early American cases. The first recorded cases in which power to choose to forbear or to do the act was held necessary for criminal responsibility, seem to be two cases decided in Ohio, in 1834 and 1843. In the first, *State v. Thompson*,⁹⁰ Judge Wright told the jury that if the defendant

pulses concern abnormalities of the sex life. Peterson, Haines and Webster, *Legal Medicine and Toxicology* (2d ed., 1923), p. 553.

⁸⁶ Mercier, *Crime and Insanity* (1911), p. 240. Strange and interesting cases of persons who knew the wrongfulness of their impulses, but who were irresistibly impelled to carry them into action, have been recorded in Maudsley's *Pathology of Mind* (3d ed., 1890), chap. vii.

⁸⁷ Glueck, S. S., "Ethics, Psychology and the Criminal Responsibility of the Insane" (1923), 14 *Jour. Crim. Law & Crim.* 208.

⁸⁸ Overholser, "The Role of Psychiatry in the Administration of Criminal Justice" (1929), 93 *Jour. Am. Med. Ass'n* 830.

⁸⁹ G. F. Arnold, quoted in Wigmore, *Principles of Judicial Proof* (1913), p. 352.

⁹⁰ Wright's Ohio Rep. 617, 622.

at the time of the act could discriminate between right and wrong, and was conscious of the wrongfulness of the act, and had power to forbear or to do the act, he was responsible. In the second, Judge Birchard told the jury that the test was:

Was the accused a free agent in forming the purpose to kill? Was he, at the time the act was committed, capable of judging whether that act was right or wrong? And did he know at the time that it was an offense against the laws of God and man?⁹¹

The requirement that the defendant must be a "free agent" makes irresistible impulse a defense, the Ohio Supreme Court has subsequently held.⁹²

Perhaps the most quoted of the early cases is Chief Justice Shaw's charge to the jury in *Commonwealth v. Rogers*, in 1844.⁹³ Judge Shaw began his discussion of the defense of insanity as follows:

In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

In cases of "partial insanity," the charge continued, "where the mind may be clouded and weakened, but not incapable of remembering, reasoning and judging, or so perverted by insane delusion, as to act under false impressions and influences," if the accused nevertheless "understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that

⁹¹ *Clark v. State* (1843) 12 Ohio Rep. 483, 495.

⁹² *Blackburn v. State* (1872) 23 Ohio St. 146.

⁹³ 7 Metc. (Mass.) 500.

knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment; such partial insanity is not sufficient to exempt him from responsibility for criminal acts."

Judge Shaw then continued:

If then it is proved, to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse: If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.

The length of Judge Shaw's charge leaves it doubtful just what test of irresponsibility he did adopt. The last paragraph quoted seems to recognize irresistible impulse, as well as inability to distinguish right from wrong, as a defense, and the case has been cited to support the irresistible impulse test.⁹⁴ On the other hand, many cases have cited Judge Shaw's opinion to support the rule that knowledge of right and wrong is the only test, and that irresistible impulse is not a defense.⁹⁵ Dean Pound has also said that "Judge Shaw did nothing except what was

⁹⁴ *Parsons v. State* (1886) 81 Ala. 577, 2 So. 854; *Ryan v. People* (1915) 60 Colo. 425, 153 Pac. 756; *State v. Windsor* (1851) 5 Harr. (Del.) 512; *Bradley v. State* (1869) 31 Ind. 492.

⁹⁵ *U.S. v. Holmes* (1858) Fed. Cas. No. 15,382, 1 Cliff. 98, 119; *Spencer v. State* (1888) 69 Md. 28, 13 Atl. 809; *Bovard v. State* (1856) 30 Miss. 600; *Stuart v. State* (1873) 60 Tenn. 178; *State v. Harrison* (1892) 36 W. Va. 729, 749, 15 S.E. 982; *Oborn v. State* (1910) 143 Wis. 249, 126 N.W. 737. In *State v. Harrison*, *supra*, Brannon, J., mentioned the fact that the Supreme Court of Indiana had cited *Comm. v. Rogers* to support the irresistible impulse test, and said: "It struck me that the opinion of Chief Justice Shaw not only did not support this view, but supported the 'right and wrong' test; and I find that Mr. Justice Clifford concurs in this view by citing Chief Justice Shaw's opinion in support of the 'right and wrong' test in *U.S. v. Holmes*, *supra*."

done in the M'Naghten case."⁹⁶ A third interpretation is that Judge Shaw's introductory statement shows that he regarded the presence of criminal intent the only question to be decided, and that there is no arbitrary test of insanity.⁹⁷ Professor Keedy has subjected Judge Shaw's charge to a searching analysis, pointing out its contradictions and confusion.⁹⁸

Two years after the Rogers Case, came another leading early case, decided by another eminent jurist, the charge of Chief Justice Gibson in *Commonwealth v. Mosler*, 1846.⁹⁹ Judge Gibson in this charge divided insanity into three forms: general, partial, and homicidal. "The law is," he said, "that whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action."

"But," he continued, "there is a moral or homicidal insanity, consisting of an irresistible inclination to kill, or to commit some other particular offense." Of this type of disorder he said:

There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under coercion, which, while its results are clearly perceived, is incapable

⁹⁶ Discussion of report of Professor Keedy's Committee B of the American Institute of Criminal Law and Criminology on "Insanity and Criminal Responsibility" (1911), 2 *Jour. Crim. Law & Crim.* 544.

⁹⁷ See, for example, the suggestion of Dr. Morton Prince that Chief Justice Shaw's charge agrees with the recommendation of Professor Keedy's committee that the legal tests of insanity be abolished. Discussion (1911), 2 *Jour. Crim. Law & Crim.* 541.

⁹⁸ Keedy, "Insanity and Criminal Responsibility" (1917), 30 *Harv. Law Rev.* 724. Professor Keedy concluded his criticism of the charge with this telling observation: "The amount of practical value possessed by the charge of Chief Justice Shaw may be determined from the fact that the jury in the case, after hearing the charge and retiring for several hours, returned to the court room, and, according to the official report, asked the Chief Justice: 'What degree of insanity will amount to a justification of the offense?'"

⁹⁹ 4 Pa. St. 264.

of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. . . . To establish it as a justification in any particular case it is necessary either to show, by clear proofs, its contemporaneous existence, evinced by present circumstances, or the existence of an habitual tendency developed in previous cases.

The cautious language in which both Judge Shaw and Judge Gibson discussed the proposition that lack of volition or will power may serve as a defense to crime is only natural, in view of the fact that they were for the first time opening the door to a doctrine that was then, even more than now, regarded as dangerous to public safety. Similar caution was shown by the Illinois Supreme Court when it was called upon to lay down a test of responsibility in 1863. The unsoundness of mind which will entitle a defendant to an acquittal, said the Illinois court, "must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them."¹⁰⁰ This rule seems to recognize irresistible impulse as a possible form of disorder, but allows it as a defense to crime only if it obliterates the sense of right and wrong; it is, in short, merely a rewording of the right and wrong test.¹⁰¹

At this time, however, other states began to accept irresistible impulse as a defense to crime without such hesitancy. The restriction which Chief Justice Gibson hedged about the defense of "homicidal mania"—that before it will be recognized by

¹⁰⁰ *Hopps v. People*, 31 Ill. 385, 392.

¹⁰¹ Illinois has since held that irresistible impulse constitutes a defense to crime, even where knowledge of right and wrong is not obliterated. *People v. Lowhorne* (1920) 292 Ill. 32, 126 N.E. 620.

courts, it must be shown to be habitual—was rejected by Kentucky in 1863,¹⁰² and by Indiana in 1869,¹⁰³ the Supreme Court of the latter state observing that such a requirement “would find very few cases where it could be favorably applied. Before the defense could be available, the victim of the mania would doubtless have been confined for life, or executed, in the effort to acquire the habit.”¹⁰⁴ In 1868, the Iowa court held that if a person commit a homicide knowing it to be wrong, but driven to it by an uncontrollable and irresistible impulse arising from an insane mental condition, he is not responsible,¹⁰⁵ but in a recent case, Iowa has rejected irresistible impulse as a defense.¹⁰⁶ Connecticut has recognized the defense of irresistible impulse since 1873,¹⁰⁷ Michigan since 1878,¹⁰⁸ and Virginia since 1881.¹⁰⁹

The leading judicial exposition of the irresistible impulse doctrine is found in the opinion of Judge Somerville in *Parsons v. State*.¹¹⁰ In that opinion, Judge Somerville first reviewed the English cases, and concluded that the rule laid down in M’Naghten’s Case “has been followed by the general current of American adjudications.” Nevertheless, he continued:

The inquiry must not be unduly obstructed by the doctrine of *stare decisis*, for the life of the common law system and the hope of its permanency consist largely in its power of adaptation to new scientific discoveries, and the requirements of an ever advancing civilization. . . . It is not like the laws of the Medes and Persians, which could not be changed.

In considering what should be the proper legal rule of re-

¹⁰² *Scott v. Comm.* (1863) 61 Ky. 227.

¹⁰³ *Bradley v. State*, 31 Ind. 492.

¹⁰⁴ *Ibid.*, p. 510.

¹⁰⁵ *State v. Felter*, 25 Ia. 67.

¹⁰⁶ *State v. Buck* (1928) 205 Ia. 1028, 219 N.W. 17.

¹⁰⁷ *State v. Johnson*, 40 Conn. 136.

¹⁰⁸ *People v. Finley*, 38 Mich. 482.

¹⁰⁹ *Dejarnette v. Comm.*, 75 Va. 867.

¹¹⁰ (1886) 81 Ala. 577, 2 So. 854.

sponsibility in criminal cases, Judge Somerville laid down first the proposition that "there must be two constituent elements of legal responsibility in the commission of every crime, and no rule can be just and reasonable which fails to recognize either of them: (1) capacity of intellectual discrimination; and (2) freedom of will." If, therefore, he continued, it be true, as a matter of fact, that mental disease can so affect the mind "as to subvert the freedom of the will, and thereby destroy the power of the victim *to choose* between the right and wrong, although he perceive it," a person so affected is not responsible criminally for an act done under the influence of such controlling disease.

The question whether it be true in fact that insanity may have this effect of subverting the will, Judge Somerville said, is one of fact and not of law, and "it will not do for the courts to dogmatically deny the possible existence of such a disease." The question is a scientific one, for experts, and the truth of their testimony concerning the existence of such disease is in each case a question for the jury. The legal tests which the court should lay down to the jury Judge Somerville stated as follows:

1. Was the defendant at the time of the commission of the alleged crime, as a matter of fact, afflicted with a *disease of the mind*, so as to be either idiotic, or otherwise insane?

2. If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible.

3. If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur:

- (1) If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed.

- (2) And if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*.

Restrictions on Irresistible Impulse as a Defense. All the states permitting irresistible impulse as a defense to crime would no doubt agree that the impulse which the law recognizes must be the product of mental disease, and not merely the uncontrollable passion or fury of a sane man.¹¹¹ The test laid down in *Parsons v. State* also requires the alleged crime to have been the product of mental disease solely; this is also required in Arkansas,¹¹² but most states permitting irresistible impulse as a defense do not require proof that the insane impulse was the sole cause of the act. According to the *Parsons Case* rule, also, the irresistible impulse test is to be included in the charge in every case in which the defense of insanity is raised. The earlier Arkansas and Illinois cases, on the other hand, held that the right and wrong test was ordinarily sufficient, and that the irresistible impulse test was required only in cases where there was evidence of some disease affecting the impulses, such as paranoia,¹¹³ but both

¹¹¹ *Cawley v. State* (1902) 133 Ala. 128, 32 So. 227; *Wade v. State* (1921) 18 Ala. App. 322, 92 So. 97; *Bell v. State* (1915) 120 Ark. 530, 180 S.W. 186; *Sease v. State* (1922) 155 Ark. 130, 244 S.W. 450; *Ryan v. People* (1915) 60 Colo. 425, 153 Pac. 756; *Oldham v. People* (1916) 61 Colo. 413, 158 Pac. 148; *Plake v. State* (1889) 121 Ind. 433, 23 N.E. 273; *Howard v. Comm.* (1928) 224 Ky. 224, 5 S.W. (2d) 1056; *State v. Graviotte* (1870) 22 La. Ann. 587; *People v. Finley* (1878) 38 Mich. 482; *People v. Mortimer* (1882) 48 Mich. 37, 11 N.W. 776; *People v. Bowen* (1911) 165 Mich. 231, 130 N.W. 706; *Flanders v. State* (1915) 24 Wyo. 81, 156 Pac. 1121.

In Iowa and Pennsylvania, although the more recent cases seem *contra*, the older decisions recognized irresistible impulse as a defense, but, as in the cases above, distinguished between such disorders and mere uncontrollable fury in a sane man. *State v. Felter* (1868) 25 Ia. 67; *State v. Mewherter* (1877) 46 Ia. 88; *Comm. v. Calhoun* (1913) 238 Pa. 474, 86 Atl. 472.

¹¹² *Green v. State* (1898) 64 Ark. 523, 43 S.W. 973; *Bell v. State* (1915) 120 Ark. 530, 553, 180 S.W. 186; *Hankins v. State* (1917) 133 Ark. 38, 201 S.W. 832; *Travis v. State* (1923) 160 Ark. 215, 254 S.W. 464.

¹¹³ *Bell v. State* (1915) 120 Ark. 530, 180 S.W. 186; *People v. Lowhone* (1920) 292 Ill. 32, 126 N.E. 620. This rule was approved by Bishop, for

these states have subsequently approved the use of this test even in cases where there was no evidence of impulsive disorders.¹¹⁴

Irresistible Impulse Distinguished from "Moral" or "Emotional" Insanity. Sometimes, especially in earlier cases, courts speak of "moral" insanity, consisting of a morbid propensity to commit homicide or other crime, coupled with mental sanity.¹¹⁵ This is also sometimes called "emotional" insanity, although the latter term is also sometimes used with a distinct meaning of its own, as a disorder of the emotions, the intellectual faculties remaining intact,¹¹⁶ or as some vague form of disorder in which the person may be sane the moment before the crime, insane

the reason that "in all issues the charge to the jury should disclose the law applicable to whatever facts the evidence tends to establish, not to any which it does not." Bishop, *Criminal Law* (9th ed., 1923), §386, sub. 2.

¹¹⁴ *Diggs v. State* (1916) 126 Ark. 455, 190 S.W. 448; *Hankins v. State* (1907) 133 Ark. 38, 201 S.W. 832; *People v. Krauser* (1925) 315 Ill. 485, 146 N.E. 593.

¹¹⁵ See, for example, the opinion quoted above of Chief Justice Gibson in *Comm. v. Mosler* (1846) 4 Pa. 264. Also: *Scott v. Comm.* (1863) 61 Ky. 227; *Smith v. Comm.* (1864) 62 Ky. 224; *State v. Spencer* (1846) 21 N.J.L. 196. The phrase "moral insanity" was first used in 1835 by Prichard, who was practically the founder of anthropological science in England, to denote a peculiar morbid condition in which the emotional sphere is overthrown and the moral sense is benumbed or lost, but the intellectual faculties are supposedly not affected. "The cases which Prichard brought forward in illustration of this condition were, however," says Havelock Ellis, "clearly insane in far more than 'moral' respects, and would now undoubtedly be considered insane without resort to that conception." Ellis, *The Criminal* (3d ed., 1901), p. 33. Nevertheless, this conception of a "moral" insanity pervaded the whole field of psychiatry during the nineteenth century. Cf. De Quiros, *Modern Theories of Criminality* (Eng. trans. by De Salvio, 1912), pp. 8, 49.

¹¹⁶ "It must be remembered that one who is otherwise sane will not be excused from a crime he has committed while his reason is temporarily dethroned not by disease, but by anger, jealousy, or other passion; nor will he be excused because he has become so morally depraved 'that his conscience ceases to control or influence his actions.' In other words, neither so-called 'emotional' nor 'moral' insanity will justify or excuse a crime." *Woodall v. State* (1921) 149 Ark. 33, 231 S.W. 186.

when he commits it, and sane again a moment afterward.¹¹⁷ None of these conceptions of moral or emotional insanity, "coupled with mental sanity," have any standing in psychology,¹¹⁸ and their validity as a defense to crime has been almost unanimously denied, by courts that admit irresistible impulse as a defense as well as those that do not.¹¹⁹

However, in a number of instances, courts have confused this

¹¹⁷ *Graves v. State* (1883) 45 N.J.L. 347; *Genz v. State* (1896) 58 N.J.L. 482, 34 Atl. 816; *Taylor v. U.S.* (1895) 7 App. D.C. 27; *Snell v. U.S.* (1900) 15 App. D.C. 501.

¹¹⁸ Psychiatrists today agree that there is no "moral sense" apart from the intellectual. What we call our "moral sense," our idea of "right and wrong," is indissolubly bound up with our social judgments, and with the gradual growth of our social relationships. "Many cases have arisen in which moral imbecility has been advanced as a solution. But, upon investigation, they have all been found to be insane, or to be intellectually defective, or to be the subjects of some mental conflict." Smith, *The Psychology of the Criminal* (1922), p. 154. This same conclusion has been reached, not only of Prichard's original cases, as stated by Havelock Ellis, but in all modern investigations. See Rosanoff, *Manual of Psychiatry* (6th ed., 1927), pp. 189, 190; Healy, *The Individual Delinquent* (1915), pp. 783, 788.

¹¹⁹ *Alabama*: *Boswell v. State* (1879) 63 Ala. 307, 35 Am. Rep. 20; *Parsons v. State* (1886) 81 Ala. 577, 2 So. 854; *Hall v. State* (1922) 208 Ala. 199, 94 So. 59; *Wade v. State* (1921) 18 Ala. App. 322, 92 So. 97; *Arkansas*: *Watson v. State* (1928) 177 Ark. 708, 7 S.W. (2d) 980, 59 A.L.R. 356; *California*: *People v. Kernaghan* (1887) 72 Cal. 609, 14 Pac. 566; *People v. Kerrigan* (1887) 73 Cal. 222, 14 Pac. 849; *People v. Gilberg* (1925) 197 Cal. 306, 240 Pac. 1000; *Colorado*: *Oldham v. People* (1916) 61 Colo. 413, 158 Pac. 148; *Georgia*: *Loyd v. State* (1872) 45 Ga. 57; *Illinois*: *People v. Spencer* (1914) 264 Ill. 124, 106 N.E. 219; *Indiana*: *Goodwin v. State* (1884) 96 Ind. 550; *Sharp v. State* (1903) 161 Ind. 288, 68 N.E. 286; *Kentucky*: *Banks v. Comm.* (1911) 145 Ky. 800, 141 S.W. 380; *Louisiana*: *State v. Lyons* (1904) 113 La. 959, 996, 37 So. 890; *Maryland*: *Spencer v. State* (1888) 69 Md. 28, 13 Atl. 809; *Mississippi*: *Cunningham v. State* (1879) 56 Miss. 269, 31 Am. Rep. 360; *Nebraska*: *Schwartz v. State* (1902) 65 Neb. 196, 91 N.W. 190; *Bothwell v. State* (1904) 71 Neb. 747, 99 N.W. 669; *New Jersey*: *State v. Spencer* (1846) 21 N.J.L. 196, 207; *State v. Aeschbach* (1931) 107 N.J.L. 433, 153 Atl. 505; *North Carolina*: *State v. Brandon* (1862) 53 N.C. (8 Jones L.) 463; *State v. Potts* (1888)

fanciful notion of "moral" or "emotional" insanity with irresistible impulse as we have used the term (impairment of the power of volition, resulting from mental disease), and in rejecting the former, have also rejected the latter.¹²⁰ But many cases have distinguished between the two, holding that while "moral" or "emotional" insanity has no place either in psychology or law, yet irresistible impulse arising from a disease of the mind, is a valid defense.¹²¹

Reasons Why Courts Reject Irresistible Impulse as a Defense.

The rule followed in the majority of states, that knowledge of right and wrong in regard to the particular act charged is the only test of responsibility, rejects the irresistible impulse

100 N.C. 457, 6 S.E. 657; *Ohio*: *State v. Adin* (1876) 1 Ohio W. Bull. 38; *Oregon*: *State v. Lauth* (1905) 46 Ore. 342, 80 Pac. 660; *Texas*: *Harrison v. State* (1902) 44 Tex. Crim. 164, 69 S.W. 500; *Wisconsin*: *Lowe v. State* (1903) 118 Wis. 641, 96 N.W. 417.

¹²⁰ The Florida court invariably uses the terms "moral insanity" and "irresistible impulse" as synonymous. *Davis v. State* (1902) 44 Fla. 32, 32 So. 822; *Cochran v. State* (1913) 65 Fla. 91, 61 So. 187, 189; *Hall v. State* (1919) 78 Fla. 420, 83 So. 513; *Collins v. State* (1924) 88 Fla. 578, 102 So. 880. The two concepts have also been confused in other states. See: *State v. Soper* (1899) 148 Mo. 217, 237, 49 S.W. 1007 (rejecting "the doctrine of 'insane or uncontrollable impulse,' under the influence of which a homicide may be sane just the instant before he strikes the fatal blow, and sane just the instant afterwards, but entirely *non compos* during the instantaneous interval"); *State v. Dunn* (1903) 179 Mo. 95, 115, 77 S.W. 848; *Graves v. State* (1883) 45 N.J.L. 347 (citing kleptomania as an example of "moral insanity"); *Schwartz v. State* (1902) 65 Neb. 196, 91 N.W. 190; *Bothwell v. State* (1904) 71 Neb. 747, 99 N.W. 669; *State v. Terry* (1917) 173 N.C. 761, 765, 92 S.E. 154; *State v. Levelle* (1891) 34 S.C. 120, 13 S.E. 319; *Oborn v. State* (1910) 143 Wis. 249, 273, 126 N.W. 737.

¹²¹ *Parsons v. State* (1886) 81 Ala. 577, 2 So. 854; *Manning v. State* (1928) 217 Ala. 357, 116 So. 360; *Bell v. State* (1915) 120 Ark. 530, 553, 180 S.W. 186; *Woodall v. State* (1921) 149 Ark. 33, 231 W. 186; *Ryan v. People* (1915) 60 Colo. 425, 153 Pac. 756; *Oldham v. People* (1916) 61 Colo. 413, 158 Pac. 148; *Goodwin v. State* (1884) 96 Ind. 550; *Banks v. Comm.* (1911) 145 Ky. 800, 141 S.W. 380; *Howard v. Comm.* (1928) 224 Ky. 224, 5 S.W. (2d) 1056; *State v. Adin* (1876) 1 Ohio W. Bull. 38; *Lowe v. State* (1903) 118 Wis. 641, 96 N.W. 417 (but though the Wisconsin

test by implication at least, and most of these states have rejected irresistible impulse expressly.¹²² Many of these states, however, have never given any reason for this rejection; the cases cite precedents to prove that irresistible impulse "has never been

sin court in this case distinguished between irresistible impulse and "moral" insanity, in a more recent case the court uses the two terms as synonymous. *Oborn v. State* [1910] 143 Wis. 249, 273, 126 N.W. 737; *Flanders v. State* (1915) 24 Wyo. 81, 156 Pac. 1121.

¹²² *California*: *People v. Hoin* (1882) 62 Cal. 120; *People v. Ward* (1894) 105 Cal. 335, 38 Pac. 945; *People v. McCarthy* (1896) 115 Cal. 255, 46 Pac. 1073; *People v. Kernaghan* (1887) 72 Cal. 609, 14 Pac. 566; *People v. Kerrigan* (1887) 73 Cal. 222, 14 Pac. 849; *People v. Hubert* (1897) 119 Cal. 216, 51 Pac. 329; *People v. Barthleman* (1898) 120 Cal. 7, 52 Pac. 112; *People v. Owens* (1899) 123 Cal. 482, 56 Pac. 251; *People v. Methewer* (1901) 132 Cal. 326, 64 Pac. 481; *People v. Trebilcox* (1906) 149 Cal. 307, 86 Pac. 684; *Florida*: *Williams v. State* (1903) 45 Fla. 128, 138, 34 So. 279; *Cochran v. State* (1913) 65 Fla. 91, 98, 61 So. 187; *Hall v. State* (1919) 78 Fla. 420, 442, 83 So. 513; *Collins v. State* (1924) 88 Fla. 578, 583, 102 So. 880; *Georgia*: *Choice v. State* (1860) 31 Ga. 424, 475; *Anderson v. State* (1871) 42 Ga. 9; *Westmoreland v. State* (1872) 45 Ga. 225; *Fogarty v. State* (1888) 80 Ga. 450, 5 S.E. 782; *Glover v. State* (1907) 129 Ga. 717, 59 S.E. 816; *Flanagan v. State* (1898) 103 Ga. 619, 30 S.E. 550; *Iowa*: *State v. Buck* (1928) 205 Ia. 1028, 219 N.W. 17; *Kansas*: *State v. Nixon* (1884) 32 Kans. 205, 4 Pac. 159; *State v. Mowry* (1887) 37 Kans. 369, 15 Pac. 282; *State v. O'Neil* (1893) 51 Kans. 651, 33 Pac. 287; *State v. Arnold* (1909) 79 Kans. 533, 100 Pac. 64; *State v. White* (1922) 112 Kans. 83, 209 Pac. 660; *Maine*: *State v. Knight* (1901) 95 Me. 467, 50 Atl. 276; *Maryland*: *Spencer v. State* (1888) 69 Md. 28, 13 Atl. 809; *Minnesota*: *State v. Scott* (1889) 41 Minn. 365, 43 N.W. 62; *Mississippi*: *Cunningham v. State* (1879) 56 Miss. 269; *Smith v. State* (1909) 95 Miss. 786, 49 So. 945; *Missouri*: *State v. Kotovsky* (1881) 74 Mo. 247; *State v. Pagels* (1887) 92 Mo. 300, 317, 4 S.W. 931; *State v. Williamson* (1891) 106 Mo. 162, 173, 17 S.W. 172; *State v. Miller* (1892) 111 Mo. 542, 20 S.W. 243; *State v. Soper* (1899) 148 Mo. 217, 237, 49 S.W. 1007; *State v. Dunn* (1903) 179 Mo. 95, 77 S.W. 848; *State v. Berry* (1903) 179 Mo. 377, 78 S.W. 611; *State v. Weagley* (1920) 286 Mo. 677, 690, 228 S.W. 817; *Nebraska*: *Schwartz v. State* (1902) 65 Neb. 196, 91 N.W. 190; *Bothwell v. State* (1904) 71 Neb. 747, 99 N.W. 669; *New Jersey*: *Graves v. State* (1883) 45 N.J.L. 347; *Genz v. State* (1896) 59 N.J.L. 488, 37 Atl. 69; *State v. Carrigan* (1919) 93 N.J.L. 268, 108 Atl. 315; *Mackin v. State* (1896) 59 N.J.L. 495, 36 Atl. 1040; *State v. Noel*

recognized in this state"—and that is all.¹²⁸ Others have at some time or other given reasons for their decisions. The grounds which courts have mentioned for rejecting irresistible impulse as a defense to crime are four: (1) The belief that no such disorder is in fact possible; (2) if it does exist, it is too difficult to prove to be allowed as a defense to crime; (3) it is a defense dangerous to society; and (4) statutes setting forth the right and wrong test as the only criterion of responsibility prevent courts from adopting any other tests.

(1926) 102 N.J.L. 659, 133 Atl. 274; *New York*: *Flanagan v. People* (1873) 52 N.Y. 467; *People v. Coleman* (1881) 1 N.Y. Crim. 1; *People v. Walworth* (1873) 4 N.Y. Crim. 355; *People v. Waltz* (1874) 50 How. Prac. Rep. 204; *Walker v. People* (1882) 88 N.Y. 81; *People v. Carpenter* (1886) 102 N.Y. 238, 6 N.E. 584; *North Carolina*: *State v. Brandon* (1862) 53 N.C. 463; *State v. Potts* (1888) 100 N.C. 457, 6 S.E. 657; *State v. Cooper* (1915) 170 N.C. 719, 87 S.E. 50; *State v. Terry* (1917) 173 N.C. 761, 92 S.E. 154; *Oklahoma*: *Snodgrass v. State* (1918) 15 Okla. Crim. 117, 175 Pac. 129; *Sloan v. State* (1923) 25 Okla. Crim. 15, 218 Pac. 717; *Tittle v. State* (1929) 44 Okla. Crim. 287, 280 Pac. 865; *Oregon*: *State v. Hassing* (1911) 60 Ore. 81, 118 Pac. 195; *Pennsylvania*: *Comm. v. Schroeder* (1931) 302 Pa. 1, 152 Atl. 835; *South Carolina*: *State v. Bundy* (1885) 24 S.C. 439; *State v. Alexander* (1888) 30 S.C. 74, 8 S.E. 440; *State v. Levelle* (1891) 34 S.C. 120, 131, 13 S.E. 319; *State v. Lloyd* (1909) 85 S.C. 73, 67 S.E. 9; *Tennessee*: *Wilcox v. State* (1894) 94 Tenn. 106, 28 S.W. 312; *Davis v. State* (1930) 161 Tenn. 23, 28 S.W. (2d) 993; *Texas*: *Hurst v. State* (1899) 40 Tex. Crim. 378, 46 S.W. 635, 50 S.W. 719; *Cannon v. State* (1900) 41 Tex. Crim. 467, 56 S.W. 351; *Lowe v. State* (1902) 44 Tex. Crim. 224, 70 S.W. 206; *Smith v. State* (1909) 55 Tex. Crim. 563, 117 S.W. 966; *Thomas v. State* (1909) 55 Tex. Crim. 293, 116 S.W. 600; *Roberts v. State* (1912) 67 Tex. Crim. 580, 150 S.W. 627; *Kirby v. State* (1912) 68 Tex. Crim. 63, 150 S.W. 455; *Mikeska v. State* (1916) 79 Tex. Crim. 109, 182 S.W. 1127; *Craven v. State* (1923) 93 Tex. Crim. 328, 247 S.W. 515; *Langhorn v. State* (1926) 105 Tex. Crim. 470, 289 S.W. 57; *West Virginia*: *State v. Harrison* (1892) 36 W. Va. 729, 15 S.E. 982; *State v. Cook* (1911) 69 W. Va. 717, 72 S.E. 1025; *Wisconsin*: *Oborn v. State* (1910) 143 Wis. 249, 126 N.W. 737.

¹²⁸ None of the Georgia, Iowa, Kansas, Nebraska, New Jersey, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, or Wisconsin cases cited above state any reason why they reject the irresistible impulse doctrine. This in spite of the fact that the Iowa, Pennsylvania, Wisconsin, and Texas

1. In a number of the earlier cases, the judges gave as a reason for rejecting the irresistible impulse test the opinion that no such thing as a really irresistible impulse was possible, and that a person who knew the nature and quality of the act and that it was wrong could not be driven to commit it by any uncontrollable impulse.¹²⁴ But whether or not knowledge of right and wrong may co-exist with a lack of power to do the right and resist the wrong would seem to be a question for psychiatrists, and not judges, to decide. As Judge Somerville said, "It will not do for the courts to dogmatically deny the possible existence of such a disease, or its pathological and psychical effects."¹²⁵ And it should be noted that such dogmatic denials do not appear in twentieth century decisions.¹²⁶

cases cited overruled earlier cases which seem favorable to irresistible impulse as a defense. Of the cases decided by the other states listed, also, only a few give any reasons.

¹²⁴ Thus, Judge Brannon said: "For myself, I cannot see how a person who rationally comprehends the nature and quality of an act, and knows that it is wrong and criminal, can act through irresistible impulse." *State v. Harrison* (1892) 36 W. Va. 729, 15 S.E. 982. So also the Mississippi court has said: "The possibility of the existence of such a mental condition is too doubtful, the theory is too problematical, and too incapable of a practical solution, to afford a safe basis of legal adjudication." *Cunningham v. State* (1879) 56 Miss. 269. In other cases of this period, the courts assumed that these so-called irresistible impulses were merely not resisted, but could be resisted if sufficient cause for resistance were present. The statement of Baron Bramwell, in 1859, is often quoted: "If an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime punishable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration." *Reg. v. Haynes*, 1 Fost. & F. 666.

¹²⁵ *Parsons v. State* (1886) 81 Ala. 577, 2 So. 854. *Accord*: *State v. Green* (1931) 78 Utah 580, 6 Pac. (2d) 177.

¹²⁶ A possible exception is the statement in 1910 by the Wisconsin court, *Oborn v. State*, 143 Wis. 249, 126 N.W. 737, that: "He who can distin-

2. Another objection sometimes made is that this defense is too vague and uncertain and too difficult to prove or disprove.¹²⁷ This argument is also found mainly in the earlier cases. "The expert who testifies to the discovery of poison in human remains," it has been said, "can actually produce its metallic basis in presence of the jury. But insanity is a defect of the organ that thinks, the brain. *That* can as yet be tested by no analysis, seen while life exists by no lens, measured by no instrument. The molecular change which accompanies thought ceases at death, and we but guess at the physical functions of the brain."¹²⁸

It is true that it is often very difficult to ascertain whether the act charged was or was not the product of an insane, irresistible impulse, but in most cases, it is just as difficult to prove capacity or incapacity to know right from wrong.^{128a} The problem of proof is the real riddle in all these cases, but it would seem that the solution lies in reforming the method of trying the issue, rather than in rejecting certain defenses merely because they are difficult to disprove.

3. In connection with the objection that irresistible impulse is difficult to prove or disprove, it has been said that to permit this

guish between right and wrong must, at his peril, choose rightly between them." For, as Bishop has said, it is inconceivable that judges would make such a statement unless they were convinced that so-called irresistible impulses could, in fact, be resisted: "That there is a solitary incumbent of any judicial bench in the United States, high or low, who really believes and intends to assert that our law punishes any man for what he does under a necessity which it is impossible for him to resist, the present writer does not believe, and if he did believe it he could only speak of it as an unprecedented horror. . . . It is mere common charity to assume that those judges who seem to maintain the unjust doctrine stated in this section, believe it for the reason that they utterly repudiate, as an ensnaring myth, the existence of the irresistible impulse." Bishop, *New Commentaries on the Criminal Law* (8th ed., 1892), vol. i, p. 277.

¹²⁷ *Flanagan v. People* (1873) 52 N.Y. 467, 470; *State v. Bundy* (1885) 24 S.C. 439, 445; *Oborn v. State* (1910) 143 Wis. 249, 126 N.W. 737.

¹²⁸ *U.S. v. Young* (1885) 25 Fed. 710. See also *Reg. v. Stokes* (1848) 3 Car. & K. 185.

^{128a} *State v. Green* (1931) 78 Utah 580, 6 Pac. (2d) 177.

defense would be "dangerous to society."¹²⁰ Indeed, some courts have gone further, and insisted that the acceptance of the irresistible impulse test would open the door for the escape of criminals,¹⁸⁰ would be the cover for the commission of crime and its justification, rendering prosecution for crime impossible,¹⁸¹ and, in short, would mark the end of civilization.¹⁸² "It will be a sad day," one court has foreboded, "for this state, when uncontrollable impulse shall dictate a 'rule of action' to our courts."¹⁸³

The courts which have predicted these calamitous effects of adopting the irresistible impulse test have never deigned to support their gloomy forebodings with any evidence to prove that such effects will result, or that they have resulted in the states where the test has been accepted. No statistics have ever been published tending to prove that the recognition of irresistible impulse as a defense has tended to break down the administration of justice.

4. In five states, the right and wrong test is established by statute,¹⁸⁴ and these statutes have uniformly been held to ex-

¹²⁰ *State v. Nixon* (1884) 32 Kans. 211, 4 Pac. 159.

¹⁸⁰ *Smith v. State* (1909) 95 Miss. 768, 49 So. 836.

¹⁸¹ *State v. Williamson* (1891) 106 Mo. 173, 17 S.W. 172; *Flanagan v. People* (1873) 52 N.Y. 467, 470; *Oborn v. State* (1910) 143 Wis. 249, 126 N.W. 737.

¹⁸² *State v. Buck* (1928) 205 Ia. 1028, 219 N.W. 17. In this case, the Iowa court said that while persons who take human life unintentionally, through the loss of mental control, should be treated "wisely, kindly, and gently," yet "courts must consider all humanity, including the 'sane' as well as the 'insane,' for, if the fabric of civilization is broken down, and the State can no longer protect life, the result will be disaster. . . ." This seems a wholly gratuitous assumption that "the fabric of civilization" will necessarily be broken down if irresistible impulse should ever be admitted as a defense. The assumption is especially strange in view of the fact that irresistible impulse had been admitted as a defense in all the prior Iowa cases, covering a period of 60 years. *State v. Felter* (1868) 25 Ia. 67, and cases cited in *State v. Buck*, *supra*.

¹⁸³ *State v. Pagels* (1887) 92 Mo. 300, 4 S.W. 931.

¹⁸⁴ Minn. Gen. Stat. (1923), §9915; N.Y. Penal Code, Consol. Laws (Cahill, 1923), chap. 41, §1120; N. Dak. Comp. Laws (1913), §9207; Okla. Comp. Stat. (1921), §1511; S. Dak. Comp. Laws (1929), §3583.

clude any other test of criminal responsibility.¹³⁵ Also, in four states,¹³⁶ there is a statutory provision that "a morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor." This "morbid propensity" seems to mean the same thing as irresistible or uncontrollable impulse.¹³⁷

The Florida court has found an unusual reason for adhering to the right and wrong test. Florida has a statutory provision that "the common law of England in relation to crime, except in so far as the same relates to modes and degrees of punishment, shall be of full force in the State where there is no existing provision by statute on the subject."¹³⁸ Since there is no Florida statute defining the degree of insanity which shall constitute a defense to crime, the court has held, the common law as set forth in M'Naghten's Case governs.¹³⁹

¹³⁵ *State v. Scott* (1889) 41 Minn. 365, 43 N.W. 62; *People v. Carlin* (1909) 194 N.Y. 448, 87 N.E. 805; *People v. Moran* (1928) 249 N.Y. 179, 163 N.E. 553; *State v. Barry* (1903) 11 N. Dak. 428, 92 N.W. 809; *Maas v. Terr.* (1901) 10 Okla. 714, 63 Pac. 960; *Sloan v. State* (1928) 25 Okla. Crim. 15, 218 Pac. 717; *State v. Leehman* (1891) 2 S. Dak. 171, 49 N.W. 3.

¹³⁶ New York Penal Code, Consol. Laws (Cahill, 1930), chap. 41, §34; Okla. Stat. (1931), §1799; Ore. Code (1930) §14-1042; S. Dak. Comp. Laws (1929), §3585.

¹³⁷ In *People v. Carpenter* (1886) 102 N.Y. 238, 250, a requested instruction that if "some controlling disease was in truth the acting power within him," the defendant would not be responsible, was held correctly refused, the court saying that the principle of this request was "impliedly condemned" by §§21 and 23 of the Penal Code (§23 is now §34, *supra*), as well as expressly rejected by prior decisions. In *State v. Hassing* (1911) 60 Ore. 81, 118 Pac. 195, it was said that such a statutory provision creates a "conclusive presumption" that a person with sufficient mental capacity to know an act is unlawful and wrong is capable of governing his conduct accordingly, and of resisting any impulse to violate the law.

¹³⁸ Fla. Comp. Gen. Laws (1927), vol. iv, §7126.

¹³⁹ *Davis v. State* (1902) 44 Fla. 32, 49, 32 So. 822; *Hall v. State* (1919) 78 Fla. 420, 441, 83 So. 513. But this seems unsound. It is true that English common law, as it stood at the time of the Revolution, is the common

5. A fifth important reason why the courts reject irresistible impulse as a defense, but one which they do not mention, is the historical. The rule that knowledge of right and wrong as to the act charged is the sole test of criminal responsibility, rests upon the Opinion of the Judges following M'Naghten's Case. In that opinion, we find no reference to irresistible impulse, because the judges were not asked to pass upon that question. M'Naghten was a victim of a form of insanity characterized by delusions, and both questions and answers were confined to the law applicable to persons suffering from such delusional insanity.

The fact that the judges did not therefore say the last word on the *entire* law of insanity (even as it was in their day) has strangely been overlooked by most commentators and judges since that time. . . . When the doctrine was introduced as a defense in the early cases, where it was obvious that certain defendants, though *apparently* reasoning logically, nevertheless had such marked disturbances of the affective-volitional (and inhibitory) modes of mental life as not to have been free agents when they committed the alleged criminal acts, the reply of the judges to any argument in favor of irresistible

law of the American states, but this does not apply to English law, common or statutory, that has arisen since the independence of this country. The answers in M'Naghten's Case were not given until 1843. They do not constitute a decision upon any actual case, but were simply given *extra curiam*. "In view of this fact, the M'Naghten rules can only be used in our American courts as rules for the interpretation of American law, and not as a part of the law itself. . . . But it would be difficult, indeed, to demonstrate that the rules governing delusions and the knowledge of right and wrong, as expressed in the M'Naghten Case, had any pre-existence in American law. They had no pre-existence even in English law, for they contain entirely new matter. They do not strictly follow Bracton, or Littleton, or Coke, or Hale, or Erskine. They do not confirm the ruling of any former court. They are not based on any act of Parliament. They are a brand-new formula, announced by English judges, for England, in 1843. How, then, do they become a part of American law? The only answer is that they become a part of American law by being adopted arbitrarily by the courts. There is no statutory warrant for them." Wharton and Stillé, *Med. Juris*. (5th ed., 1905), vol. i, pp. 555-556.

impulse was that the crystallized and authoritative tests of irresponsibility made no provision for such a doctrine.¹⁴⁰

§5. TREND OF THE LAW

Can we say that the cases holding that disorders of the volitional phase of the mind, resulting in irresistible impulses to commit certain anti-social acts constitute a defense to crime as well as disorders of the intellect resulting in inability to understand the wrongfulness of such acts, represent the more modern judicial rule, which enlightened courts are tending to adopt? Or to state the question in more legalistic language, do the cases indicate a tendency to broaden the rule laid down in M'Naghten's Case by adding the irresistible impulse test?

The answer is no. A review of the cases reveals no ground for saying that one view is more modern than the other, or that one is tending to give way to the other. All that can be said is that in the course of the past hundred years some seventeen American states have adopted the irresistible impulse test as an additional test of criminal irresponsibility, while most of the remaining states have adhered to knowledge of the wrongfulness of the act charged as the sole test. The presumption that the recognition of the volitional types of mental disorder as a defense to crime is a comparatively recent development, more to be looked for in recent than in older cases, is not borne out. Cases requiring will power to forbear doing the act as a necessary element for criminal responsibility can be found as early as 1834.¹⁴¹ The two most famous early decisions on the subject were decided in 1844 and 1846;¹⁴² both discussed at considerable length the necessity that the accused, to be punishable for crime, have

¹⁴⁰ Glueck, *Mental Disorder and the Criminal Law*, pp. 236-237.

¹⁴¹ *State v. Thompson* (1834) Wright's Ohio Rep. 617, 622. See p. 46.

¹⁴² *Comm. v. Rogers* (1844) 7 Metc. (Mass.) 500; *Comm. v. Mosler* (1846) 4 Pa. St. 264. See pp. 47, 49.

freedom of will. To go back still further, in 1840, three years before M'Naghten's Case, Lord Denman in *Regina v. Oxford* instructed the jury that "if some controlling disease" was the acting power within the defendant, "which he could not resist," he would not be responsible.¹⁴³ In short, the irresistible impulse test can be traced back at least as far as the rule in M'Naghten's Case.

If no distinction between the two rules can be made on the basis of their respective antiquity, neither can such distinction be made on the basis of their present-day popularity. There are as many recent cases adhering to the strict right and wrong test as there are those recognizing the irresistible impulse defense. Nor are the former limited to cases in which the courts felt bound by precedents. Since 1900, the question of the proper test of criminal responsibility, where the defendant pleads insanity, has arisen for the first time in eight states. In only three of these did the court accept the irresistible impulse defense.¹⁴⁴ In the other five, knowledge of right and wrong with respect to the act charged was held the sole test of responsibility.¹⁴⁵ During the same period (1900-1932), at least two states have overruled previous decisions holding knowledge of right and wrong to be the sole test, and have adopted the irresistible impulse defense.¹⁴⁶

¹⁴³ 9 Car. & P. 525. See p. 24.

¹⁴⁴ Vermont, 1901; Louisiana, 1904; Colorado, 1915. The Louisiana rule is not clear. For cases, see Digest, p. 109 *et seq.*

¹⁴⁵ Florida, 1902; North Dakota, 1903; Washington, 1909; Wyoming, 1915; Arizona, 1921. In North Dakota, the matter was controlled by statute.

¹⁴⁶ Illinois, 1920; Utah, 1931; and perhaps New Mexico, 1910. The District of Columbia in 1929 also specifically recognized irresistible impulse as a defense; the previous cases had not been very clear on the matter. For cases, see Digest, p. 115. See also the *dictum* in *State v. Schafer* (1930) 156 Wash. 240, 286 Pac. 833, that "the legal problem must resolve itself into the inquiry whether there was mental capacity or moral freedom to do or abstain from doing the particular act."

But during the same period, the reverse action was taken by at least five states which overruled previous cases in which irresistible impulse had been held a defense and adopted the stricter rule that only incapacity to know the wrongfulness of the act will serve to excuse the defendant.¹⁴⁷

The contemporaneous development of the two views can be seen in the following summary, showing when each jurisdiction adopted the one rule or the other for the first time.

The names of those states in which the rule adopted has been changed in subsequent cases are set in italics. A question mark indicates that the rule adopted is not clear.¹⁴⁸

RIGHT AND WRONG TEST

New Jersey, 1846

Georgia, 1847

North Carolina, 1862

Illinois, 1863

California, 1864

Idaho, 1871

Tennessee, 1873

New York, 1873

Nebraska, 1876

IRRESISTIBLE IMPULSE TEST

Ohio, 1834

Massachusetts, 1844

Pennsylvania, 1846 (?)

Delaware, 1851

District of Columbia, 1853

Kentucky, 1863

Iowa, 1868

Indiana, 1869

Maine, 1870*Tennessee*, 1871

Connecticut, 1873

Michigan, 1878

¹⁴⁷ Texas, 1900; Maine, 1901; Wisconsin, 1910; Iowa, 1928; Pennsylvania, 1931. And see *People v. Marquis* (1931) 344 Ill. 261, 176 N.E. 314, mentioning only knowledge of right and wrong as the test, although previous cases had expressly held irresistible impulse to be a defense.

¹⁴⁸ For citations to the cases, see Digest, p. 109 *et seq.*

Mississippi, 1879

Missouri, 1879

Texas, 1880

Virginia, 1881

Wisconsin, 1883*Arkansas*, 1883

Kansas, 1884

Oregon, 1884

South Carolina, 1885

Alabama, 1886

Maryland, 1888

Utah, 1888

Minnesota, 1889

Nevada, 1889

South Dakota, 1891

New Mexico, 1892

West Virginia, 1892

U.S. Supreme Court, 1895

Arkansas, 1896

Texas, 1900

Maine, 1901

Vermont, 1901

Florida, 1902

North Dakota, 1903

Louisiana, 1904 (?)

Washington, 1909

Wisconsin, 1910

New Mexico, 1910 (?)

Wyoming, 1915

Colorado, 1915

Illinois, 1920

Arizona, 1921

Iowa, 1928

Washington, 1930 (?)

Illinois, 1931 (?)

Utah, 1931

Pennsylvania, 1931

The necessary conclusion is that however unanimously psychiatrists may have come to recognize the existence of types of mental disorder tending to destroy the conative, or volitional,

function of the mind,¹⁴⁹ no such unanimity has been reached by the courts regarding such types of disorder as a defense to crime. On the contrary, there is no more judicial agreement on the subject today than there was a century ago.

¹⁴⁹ See p. 45.

CHAPTER III
THE LEGAL TESTS OF IRRESPONSIBILITY
(*Continued*)

§1. DELUSION

ALTHOUGH the right and wrong test (plus the irresistible impulse test in some seventeen states) is held to be the sole criterion of criminal responsibility, applicable in all cases and to all forms of mental defect or disease, nevertheless courts often lay down special rules in cases involving insane delusions—false beliefs, symptomatic of a disturbance of the higher activities of conscious mind. There are at least five different rules current in the United States concerning the effect of delusions upon criminal responsibility:

A person suffering from insane delusion is responsible for his criminal acts unless:

1. He is incapable of distinguishing right from wrong with reference to the act.
2. He is either incapable of distinguishing right from wrong with reference to the act, or is irresistibly impelled by his disorder to commit it.
3. The facts with respect to which the delusion exists would constitute a defense if they were true.
4. The facts with respect to which the delusion exists would constitute a defense if they were true, or unless the defendant committed the act by reason of an insane irresistible impulse.
5. The delusion created an irresistible impulse to commit the act ("overmastered the will").

The first two of these rules merely hold that there is no special test for delusion, and that the general test of responsibility adopted in the particular jurisdiction applies to delusion just as

it applies to every other form and symptom of mental disorder. This is true in some seventeen jurisdictions.¹

The third rule is the test laid down by the Judges of England in the Opinion following M'Naghten's Case in answering the fourth question put them by the House of Lords. It is accepted in perhaps five states, all of which profess to follow the right and wrong test as the general test of insanity.² Whether this rule is to be considered merely an example of the right and wrong test, and consistent with it, or as a distinct test, forming an exception to the right and wrong rule, is not clear.³ The fourth is the same rule, with the irresistible impulse test added.

¹ A. That knowledge of right and wrong is the sole test of responsibility, applicable to delusions as to any other type of insanity: California, District of Columbia, Kansas, Minnesota, Mississippi, Missouri, Nebraska, New York, Pennsylvania, Texas.

B. That knowledge of right and wrong and irresistible impulse are the sole tests, applicable also to delusions: Alabama, Colorado, Illinois, Kentucky, Vermont.

C. That there is no legal test for insanity, whether manifested by delusions or otherwise: Montana, New Hampshire.

For cases, see p. 75, notes 15, 16.

² *Florida*: Copeland v. State (1901) 41 Fla. 320, 26 So. 319; Davis v. State (1902) 44 Fla. 32, 32 So. 822; Blocker v. State (1926) 92 Fla. 878, 110 So. 547; *Iowa*: State v. Mewherter (1877) 46 Ia. 88. This case has perhaps been overruled in State v. Buck (1928) 205 Ia. 1028, 219 N.W. 17; *Nevada*: State v. Lewis (1889) 20 Nev. 333, 22 Pac. 241; *Tennessee*: Davis v. State (1930) 161 Tenn. 23, 28 S.W. (2d) 993; *Texas*: Alexander v. State (1928) 8 S.W. (2d) 176; but see Merritt v. State (1898) 39 Tex. Crim. 70, 45 S.W. 21.

This rule was also followed in older California, Mississippi, New York, and Pennsylvania cases. People v. Hubert (1897) 119 Cal. 216, 51 Pac. 329; Cunningham v. State (1879) 56 Miss. 269; People v. Taylor (1893) 138 N.Y. 398, 34 N.E. 275; People v. Ferraro (1900) 161 N.Y. 365, 55 N.E. 931; Comm. v. Wireback (1899) 190 Pa. 138, 42 Atl. 542. But later cases abandon this rule, and apply the right and wrong test. People v. Willard (1907) 150 Cal. 543, 89 Pac. 124; Kearney v. State (1890) 68 Miss. 233, 8 So. 292; People v. Schmidt (1915) 216 N.Y. 324, 110 N.E. 945; Comm. v. Calhoun (1913) 238 Pa. 474, 86 Atl. 472.

³ See pp. 29, 74.

It is followed in four of the states which have said that the general test is capacity to know right from wrong, and will power to resist the wrong.⁴

The fifth is a peculiar rule followed in Georgia. Although holding that the only test of responsibility is capacity to distinguish right from wrong, and that irresistible impulse is no defense, yet where the defense is insane delusion, the Georgia court has said that if the defendant's will is overmastered, he is not responsible.⁵

Historical Origin of Special Delusion Rules. The explanation

⁴ *Arkansas*: Woodall v. State (1921) 149 Ark. 33, 231 S.W. 186; *Indiana*: McHargue v. State (1923) 193 Ind. 204, 139 N.E. 316; *Massachusetts*: Comm. v. Rogers (1844) 7 Metc. 500; *Utah*: State v. Green (1931) 78 Utah 580, 6 Pac. (2d) 177. In Comm. v. Rogers, *supra*, Chief Justice Shaw said that delusion excuses crime in either of two cases: (1) where "the delusion is such that the person under its influence has a real and firm belief in some fact, not true in itself, but which, if it were true, would excuse his act," such as, for example, killing "in supposed self-defense"; (2) where the delusion "indicates . . . that the mind is in a diseased state; that the known tendency of that diseased state of the mind is to break out into sudden paroxysms of violence . . . so that although there were no previous indications of violence, yet the subsequent act, connecting itself with the previous symptoms and indications, will enable an experienced person to say that the outbreak was of such character, that for the time being it must have overborne memory and reason; that the act was the result of the disease and not of a mind capable of choosing; in short, that it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will." Written eighty-five years ago, this statement shows a remarkable appreciation of the fact that the presence of delusion is merely a symptom of mental disease, and not a phenomenon which can be divorced from the rest of the mental picture.

A view very similar to Judge Shaw's was set forth by Judge Ludlow of Pennsylvania in a number of cases of half a century ago. Comm. v. Freeth (1858) 6 Am. Law Reg. 400; Sayres v. Comm. (1879) 88 Pa. 291; Taylor v. Comm. (1885) 109 Pa. 262. See also Comm. v. Wireback (1899) 190 Pa. 138, 42 Atl. 542, 70 A.S.R. 625.

⁵ Roberts v. State (1847) 3 Ga. 310; Carr v. State (1895) 96 Ga. 284, 22 S.E. 570; Flanagan v. State (1898) 103 Ga. 619, 625, 30 S.E. 550; Taylor v. State (1898) 105 Ga. 746, 31 S.E. 764; Lee v. State (1902) 116 Ga. 563,

for the special references found in the opinions of many courts to delusion as a test or symptom, is, again, historical. In 1800, Lord Erskine, in his eloquent defense of Hadfield, had stated that "delusion . . . where there is no frenzy or raving madness, is the true character of insanity."⁶ Hadfield was acquitted, but more because of Erskine's brilliant discourse than because the court agreed with his view of the law. Certainly the idea that delusion was to be taken as the test of insanity in all cases "where there is no frenzy or raving madness" was accepted in no subsequent English case. However, the fact that Erskine won his case, and that the judge said of his remarks that "there can be no doubt upon earth" but that they were the law, has caused many American judges to assume that the case is law, and that Erskine's delusion test must be fitted somewhere into the legal test of insanity.⁷ Hence the long instructions on delusions by trial judges, and the discussions of the same topic by appellate

569, 42 S.E. 759; *Roberts v. State* (1905) 123 Ga. 146, 162, 51 S.E. 374; *Allams v. State* (1905) 123 Ga. 500, 51 S.E. 506; *Glover v. State* (1907) 129 Ga. 717, 722, 59 S.E. 816.

A similar exception seems to have been made in Tennessee. *Wilcox v. State* (1894) 94 Tenn. 106, 28 S.W. 312. But this was overruled in *Davis v. State* (1930) 161 Tenn. 23, 28 S.W. (2d) 993.

⁶ 27 How. St. Tr. 1282. See pp. 21, 23.

⁷ This is the explanation for the exception to the right and wrong test made by the Georgia court in cases of delusion. In *Roberts v. State* (1847) 3 Ga. 310, where the Georgia rule was first formulated, it was said that the right and wrong test "has undergone some modification. There are some exceptions to it; one, certainly, which was first established in the leading case of *The King vs. Hadsfield*. The great speech of Mr. Erskine in defense of Hadsfield, has shed new light upon the law of insanity. So conclusive was that celebrated argument, that it is now looked upon by the profession as authority."

Other courts also attempted to incorporate Erskine's idea that delusion is the true test of insanity into the law of responsibility. See also *Smith v. Comm.* (1864) 62 Ky. 224, 229; *Comm. v. Mosler* (1846) 4 Pa. St. 264. As late as 1904, a Wisconsin court charged: "It is said that the true test of the absence or presence of insanity is the absence or presence of delusions." The instruction was approved, when taken in connection with the other

courts, often without much reference to the general test of responsibility adopted in the jurisdiction.

Forty-three years after Hadfield's Case came the Opinion of the Judges following the acquittal of M'Naghten.⁸ Daniel M'Naghten was obviously the victim of delusions. The questions were put to the judges as a result of popular excitement over that case, and each of the questions dealt expressly with persons "afflicted with insane delusion." Though worded differently, all four questions asked one thing: What is the law respecting the criminal responsibility of persons afflicted with insane delusion?

The judges gave three answers—no two alike. To the first question, "What is the law respecting alleged crimes committed by persons afflicted with insane delusions?" they replied that a person "labouring under such partial delusions only . . . is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law."⁹

The second and third questions inquired how the question should be put to the jury in such cases of delusion, and the answer was that the jury was to be told "in all cases" that "it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong."¹⁰

The fourth question asked whether a person who commits a crime in consequence of an insane delusion is excused. To this

tests given the jury (the right and wrong test). *Schissler v. State* (1904) 122 Wis. 365, 99 N.W. 593. But the evidence in the case showed no delusional insanity; the defense relied on was epilepsy, and total unconsciousness at the time of the act. It would seem prejudicial, therefore, to tell the jury that the "true test" of insanity was the presence of delusions.

⁸ 10 Clark & Fin. 200. See *ante*, p. 24 *et seq.*

⁹ See p. 26.

¹⁰ See p. 27.

the answer was that a person who, again, was laboring under such partial delusion only, "must be considered in the same situation as to responsibility as if the facts with respect to which the delusions exists were real."¹¹

The first answer makes the test, knowledge that the act is contrary to law; the second makes it knowledge that the act is morally wrong; and the third is what we have called the "mistake of fact test," by which the person suffering from a delusion is judged like the sane man who acts under a reasonable mistake. Whether this last test was considered by the judges as equivalent to the test of legal or moral right and wrong, which they had laid down in their first two answers, or whether they considered it an illustration of the right and wrong test, or as a distinct separate test, is not clear. The right and wrong test, as we have pointed out in discussing the history of the legal tests,¹² had been given in most of the cases before 1843. But this rule that a person suffering from delusions is to be judged as if the facts of the delusion were real can be found in no prior case.¹³ And since the judges were not professing to reform or modify the law, but merely to state the law of England as it then was, it seems that this mistake of fact test was not intended by the judges as a distinct test, but as entirely consistent with the right and wrong test they had just set forth.

Mistake of Fact Test Rejected in Most States. This special delusion rule laid down in M'Naghten's Case, that a person com-

¹¹ See p. 26.

¹² See p. 20 *et seq.*

¹³ The idea underlying this "mistake of fact" rule, however, had been enunciated in Hadfield's Case—that "as a doctrine of law, the delusion and the act should be connected." This was a naïvely legalistic attempt to apply to the problem of mental unsoundness the same sort of external objective standards applied in the law of contracts or real property. The Judges in M'Naghten's Case narrowed the inquiry still further by making it purely objective; the delusion must not only be externally and apparently connected with the crime, but the connection must be such as to render the act justifiable if the facts of the delusion had been true.

mitting an anti-social act by reason of an insane delusion will not be relieved of criminal responsibility unless the facts of the delusion would constitute a defense if true, has never been accepted in the majority of American states. The assumption, often made, that this rule has been accorded general acceptance, and must be regarded as part of the law in most jurisdictions, is without foundation. As we have seen, it is law today in not more than nine states.¹⁴ On the other hand, it has been expressly repudiated by the courts of eight jurisdictions,¹⁵ and by implication in at least nine others, which have held that the general test of responsibility adopted in the jurisdiction applies to delusion as to any other manifestation of mental disorder, and that there is no special test for delusion.¹⁶

The great criticism which has been made of the rule that a person acting under an insane delusion is to be judged as if the facts of the delusion were real, is that it judges the insane man

¹⁴ Arkansas, Florida, Indiana, Iowa, Massachusetts, Nevada, Tennessee, Texas, Utah. For cases, see *ante*, pp. 70, 71, notes 2 and 4.

¹⁵ *Alabama*: *Parsons v. State* (1886) 81 Ala. 577, 2 So. 854; *Colorado*: *Ryan v. People* (1915) 60 Colo. 425, 153 Pac. 756; *District of Columbia*: *Guiteau's Case* (1882) 10 Fed. 161; *Mississippi*: *Kearney v. State* (1890) 68 Miss. 233, 8 So. 292; *Montana*: *State v. Keerl* (1904) 29 Mont. 508, 75 Pac. 362, 101 A.S.R. 579; *Nebraska*: *Kraus v. State* (1922) 108 Neb. 331, 187 N.W. 895; *New Hampshire*: *State v. Jones* (1871) 50 N.H. 369; *Texas*: *Merritt v. State* (1898) 39 Tex. Crim. 70, 45 S.W. 21; *Tubb v. State* (1909) 55 Tex. Crim. 606, 117 S.W. 858. But in *Alexander v. State* (1928) 8 S.W. (2d) 176, the Texas Court of Criminal Appeals ignored these two cases, and held the delusion test proper.

¹⁶ *California*: *People v. Willard* (1907) 150 Cal. 543, 89 Pac. 124; *Illinois*: *People v. Geary* (1921) 297 Ill. 608, 131 N.E. 97; *Kansas*: *State v. Arnold* (1909) 79 Kans. 533, 100 Pac. 64; *State v. White* (1922) 112 Kans. 85, 209 Pac. 660; *Kentucky*: *Banks v. Comm.* (1911) 145 Ky. 800, 141 S.W. 380; *Minnesota*: *State v. Scott* (1889) 41 Minn. 365, 43 N.W. 62; *Missouri*: *State v. Paulsgrove* (1907) 203 Mo. 193, 101 S.W. 27; *New York*: *People v. Schmidt* (1915) 216 N.Y. 324, 110 N.E. 945; *Pennsylvania*: *Comm. v. Calhoun* (1913) 238 Pa. 474, 86 Atl. 472; *Vermont*: *Doherty v. State* (1901) 73 Vt. 380, 50 Atl. 1113.

by the same standard as the sane man. If the facts of the delusion were such that they would constitute a defense if true, he is not punished, but if the facts, if true, would not justify a reasonable man in committing the act, he is. In other words, the law accepts the delusion, but requires him to reason about it as a sane man.¹⁷ As Dr. Ray has remarked, a lunatic will not be held liable for his act so long as he acts with reason and propriety!¹⁸ This is what Judge Ladd called the "exquisite inhumanity" of the rule.¹⁹

Mistake of Fact Rule Scientifically Fallacious. It should be noticed that there is no inhumanity in the rule as the judges in M'Naghten's Case conceived it. The rule applies, they said, only in cases where the person is "labouring under such partial delusion only, and is not in other respects insane." A person "not in other respects insane" could, of course, quite rightly be expected to reason about the subject of his own delusion as well as a sane man. The difficulty is that no such person exists. "The inadequacy of this formula or test," Dr. Morton Prince has said, "will be seen when it is remarked that it is based upon a conception of insanity that is a myth—a condition of mind that never exists.

¹⁷ It has even been held in one case that an insane delusion that the defendant acted in self-defense is no excuse unless the belief was reasonable! *State v. Shippey* (1865) 10 Minn. 223.

¹⁸ Ray, *Med. Jur.* (5th ed., 1871), p. 49. The rule, said Dr. Ray with some irony, "is certainly very plain, and it must be the fault of the lunatic, if he do not understand it. It is very reasonable, too, *if insane men would but listen to reason.*"

¹⁹ "The doctrine thus promulgated as law has found its way into the text books, and has doubtless been largely received as the enunciation of a sound legal principle since that day. Yet it is probable that no ingenuous student of the law ever read it for the first time without being shocked by its exquisite inhumanity. It practically holds a man confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power, that is required of a man in perfect mental health. It is, in effect, saying to the jury, the prisoner was mad when he committed the act, but he did not use sufficient reason in his madness." *State v. Jones* (1871) 50 N.H. 369.

The law assumes that a person may be laboring under a delusion and not be otherwise insane. The truth probably is as Dr. Mercier, a distinguished psychiatrist and psychologist, says: 'There is not, and never has been, a person who labors under partial delusion only and is not in other respects insane.'²⁰

This assumption on the part of the judges that a person may be suffering from a delusion and yet have his mental faculties otherwise intact, seems to be based on a medical fad of their time, the now exploded doctrine of phrenology.²¹ This half-scientific, half-fanciful theory proceeded on the assumption that the mind was a bundle of faculties, each having its own location in the brain, and each functioning independently of the others. In 1843, this theory was being hailed as the long-looked-for key to unlock the mystery of the mind, and, with its concomitant, faculty psychology,²² it continued in favor almost to the end of the century. It is only natural, therefore, that its fundamental tenets should, consciously or unconsciously, have been

²⁰ Quoted by Keedy (1911), 2 *Jour. Crim. Law* 539.

²¹ The theory of phrenology was first announced about 1796 by Franz Gall, an eccentric Viennese physician. According to Gall's theory, the mind consists of localized independent faculties, each one in a region of the brain whose size indicates the degree of the faculty resident in it. The degree to which a person possessed each of these "faculties," "sentiments," or "propensities" (thirty-four in number) could, it was claimed, be found by examining its corresponding "bump" on the skull. Gall was a brilliant thinker and an engaging speaker, and his methods of dissection in connection with his theory were of scientific importance. His theory of phrenology was in great vogue during most of the nineteenth century, but has been proved unsound by modern psychologists. As a scientific theory, phrenology today is to modern neurology what astrology is to astronomy.

²² Immanuel Kant is the most renowned expositor of "faculty psychology"—a system which takes the popular functional terms like "feeling," "understanding," "memory," "imagination," etc., and by logical process reduces them to some one, two, or three principal faculties. Kant adopts a threefold classification of mental phenomena: (1) knowing, (2) desire, and (3) feeling. Such a system, however, is superficial; it

accepted by the judges when they formulated a rule of responsibility for persons "labouring under partial delusion only" and "not in other respects insane." Today phrenology has been relegated to the gypsy fortune-tellers of the ghettos, but the rule of law which it engendered still holds the respect of jurists.

Delusion is not an independent phenomenon, which may exist in a mind otherwise sane, but it is an external symptom, indicative of a much deeper mental disturbance. "Insanity is a disease of the mind and delusion is a symptom of the disease."²³

Insane Delusion Distinguished from Mere Mistaken Belief of Sane Person. Courts have found difficulty in some cases in distinguishing between a delusion, the product of mental disease, and a mere superstitious or ignorant but not insane belief. In such cases, evidence is admissible to show that the alleged delusion was merely an opinion based on reason, and not a product of mental disease.²⁴ A classic case is *Hotema v. United States*.²⁵ The defendant in that case believed in witches, and that the Bible sustained that belief and taught that it was right to kill witches. He killed a woman in the belief that she was a witch. The jury were told to decide whether the act was the result of a mere erroneous conclusion, or whether it was the product of a diseased brain. The same question arose in the trial of Guiteau for the assassination of President Garfield.²⁶ Guiteau, it was shown by the evidence, killed the President because he felt it was the only possible way to unite the two factions of the Republican

makes no effort to analyze mental processes; and the powers or functions which it discriminates have no biological or genetic sanction. Psychology today starts its investigations from the given facts and not from possibilities which the facts are supposed to realize; in other words, it is inductive, and not deductive.

²³ *Ryan v. People* (1915) 60 Colo. 425, 153 Pac. 756, L.R.A. 1917F 646, Ann. Cas. 1917C 605.

²⁴ *Comm. ex rel. Haskell v. Haskell* (1869) 2 Brewst. (Pa.) 491; *Comm. v. Wireback* (1899) 190 Pa. 138, 42 Atl. 542, 70 A.S.R. 625.

²⁵ (1901) 186 U.S. 413, 22 Sup. Ct. 895.

²⁶ (1882) 10 Fed. 161.

party and "save the Republic." Judge Cox, in his charge to the jury, discussed at length the question whether this was a conclusion of the defendant's own mind, or a delusion of a divine command. The test he gave them was that "an insane delusion is never the result of reasoning and reflection."²⁷ It would seem, however, that whether a defendant's belief is symptomatic of mental disease or not, is a matter for experts, whose work it is also to determine whether or not there is any test by which all beliefs may be classified. Whatever justification there may be for judges' assuming to lay down a legal test of responsibility (which is, after all, a legal and not a medical concept), there is none for the attempt to enunciate from the bench a general rule for determining whether a particular belief is symptomatic of mental unsoundness or not.

§2. NEW HAMPSHIRE RULE—THAT THERE IS NO LEGAL TEST

The New Hampshire court, as we have said, has rejected all the legal tests which have been devised, and has held that the question of responsibility or irresponsibility is one of fact for the jury, and that the only rule that the court can give the jury is if the defendant had a mental disease, and if the criminal act was the product of that mental disease, to acquit him. In other words, the New Hampshire court rests the rule upon the fundamental principle that criminal responsibility requires a guilty intent, or *mens rea*, as well as a prohibited act. If the defendant committed the act with the required intent, he is responsible, but if his mind was so disordered that he was incapable of that

²⁷ "It is not," Judge Cox continued, "generated by them, and it cannot be dispelled by them. A man may reason himself, and be reasoned by others, into absurd opinions, and he may be persuaded into impracticable schemes and vicious resolutions, but he cannot be reasoned or persuaded into insanity or insane delusions. Whenever convictions are founded on evidence, or comparisons of facts and opinions and arguments, they are not insane delusions."

intent, he is not. The same rule is perhaps also followed in Montana.²⁸

This view was first judicially set forth in 1866, by Judge Doe, in a dissenting opinion in *Boardman v. Woodman*.²⁹ This was a case involving testamentary capacity, and not responsibility for crime. The majority of the court affirmed instructions which said that delusions were the test of insanity. Judge Doe dissented, and insisted that it is a general truth, applicable in all cases, that whether delusion is a symptom or test of insanity is a question of fact, and not of law, and that it was therefore error for the trial judge to charge the jury upon the question as one of law.³⁰

Judge Doe's view was accepted by the whole court three years later, in *State v. Pike*.³¹ The majority of the court in this case affirmed without discussion an instruction that "all symptoms and all tests of mental disease were purely matters of fact to be determined by the jury."

Judge Doe discussed the correctness of this instruction at length. "Tried by the standard of legal precedent," he said, "the instructions are wrong; tried by the standard of legal principle, they are right."³²

As reasons for rejecting the precedents, Judge Doe pointed out that the attempt to lay down a general test of insanity has met with "a striking and conspicuous want of success."³³ The law therefore should cease "attempting to install old exploded

²⁸ It is not clear from the Montana cases whether the court has adopted this rule or not. See p. 128.

²⁹ 47 N.H. 120.

³⁰ "If a jury were instructed that certain manifestations were symptoms or tests of consumption, cholera, congestion, or poison, a verdict rendered in accordance with such instructions would be set aside, not because they were not correct, but because the question of their correctness was one of fact to be determined by the jury upon evidence. Experts may testify to the indications of mental disease, as they could not if such indications were matters of fact." *Ibid.*, p. 148.

³¹ (1869) 49 N.H. 399.

³² *Ibid.*, p. 429.

³³ *Ibid.*, p. 438.

medical theories in the place of facts established in the progress of scientific knowledge."⁸⁴

Two years after the Pike Case, the New Hampshire court unanimously adopted Judge Doe's view in a decision written by Judge Ladd, *State v. Jones*.⁸⁵ Where the defense of insanity is raised, said Judge Ladd, "the real ultimate question to be determined seems to be, whether, at the time of the act, he had the mental capacity to entertain a criminal intent—whether, in point of fact, he did entertain such intent."⁸⁶

All attempts to find a universal test by which to determine the line between accountability and non-accountability, concluded Judge Ladd, have utterly failed; "and the reason of the failure, as I think, is, that it was an attempt to lay down as law that which, from its very nature, is essentially matter of fact. It is a question of fact whether any universal test exists, and it is also a question of fact what the test is, if any there be."⁸⁷

In view of these considerations, it was held that the jury was properly instructed that "if the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be 'not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant," and that any further instructions on the subject would constitute an invasion of the jury's province."⁸⁸

⁸⁴ *Ibid.*, p. 438.

⁸⁵ (1871) 50 N.H. 369.

⁸⁶ *Ibid.*, p. 382.

⁸⁷ *Ibid.*, p. 388. That there is no universal test of *mental disease* (as distinguished from legal responsibility) is, of course, testified to by all psychiatrists. "To most persons without special training the conditions labeled 'insanity' constitute a definite entity, the existence of which can be detected and demonstrated by the application of specific tests. There are, however, many different forms of mental disease and no specific tests of sanity are available or even possible. The conduct, words, thoughts and feelings of persons with mental disease are merely distortions and exaggerations of those of persons who are mentally well." Dr. H. Douglas Singer, quoted by Wigmore, in *The Illinois Crime Survey* (1929), p. 742.

⁸⁸ 50 N.H. 398.

Criticism of New Hampshire Rule. Of the criticisms which have been leveled against this view of the problem, perhaps the clearest and most detailed is that of Professor Wharton.³⁹ He points out that this rule, which would leave the whole question of responsibility to the jury, with the instruction that if the act was the product of "mental disease," to acquit, raises at once the question, what is "mental disease"? "Mental disease," says Professor Wharton, "in fact is a term so indeterminate and vague, that to leave the question to the jury with the instruction here criticised is to leave it to them without any instructions at all."⁴⁰

The argument that insanity is a question for the experts and not the courts, Professor Wharton answers by stating: "(1) that the question in criminal issues is not insanity, but irresponsibility, which it is eminently important should be limited by positive definition by the highest judicial authority the state can constitute; and (2) that experts do not form such an authority, (a) because their sense, as a body, cannot be obtained by any process known to our courts; (b) because there is no independent court of experts, which, on notice to both sides, and after argument, if necessary, can, when the experts called in a particular case conflict, give a judicial opinion upon the issue; and (c) because, in many cases of criminal defense, only those eccentric and exceptional experts are selected, who believe in some wild theory which may help out the defendant's case."⁴¹

The jury is not capable of establishing the definite and consistent rules regarding responsibility which are required, for at least three reasons: "(1) It does not form a continuous body, prepared for its office, as are our courts of justice, by prior study. (2) The reasons of its decisions are not given, so that these decisions can form the basis of future decisions. Each decision stands by itself, not controlled by those which preceded it, and not con-

³⁹ Wharton and Stillé, *Med. Jur.* (5th ed., 1905), vol. i, p. 178 *et seq.*

⁴⁰ *Loc. cit.*

⁴¹ *Ibid.*, p. 179.

trolling those which succeed. (3) There is no 'supreme' jury, by whom the decisions of 'inferior' juries can be corrected and systematized."⁴²

"The definition of penal responsibility, therefore," concludes Professor Wharton, "is a high prerogative which judges, educated for the office as they are, and appointed by the state as the guardians at once of the sovereignty of the law and the liberty of the citizen, cannot surrender or divide. The state has the right to call on them to establish a consistent system which the community may take for its guidance."⁴³

New Hampshire Rule Rejected in Other States. Whatever may be the merits of the rule adopted in New Hampshire, it has not commended itself to other courts. The Montana court, as we have said, has cited the New Hampshire cases with approval, but it is not certain that that court has actually adopted the same rule itself.⁴⁴ The rule has also been commended in the Georgia Court of Appeals, which added, however, that a contrary rule had been established by the Supreme Court of the

⁴² *Ibid.*, p. 180.

⁴³ *Ibid.*, pp. 180-181. In answer to Professor Wharton's criticisms, it might be pointed out that while it may be true that to instruct the jury to acquit if the crime was the product of "mental disease," is practically to leave the question to the jury without any instructions, yet the present practice, of giving the jury long and involved instructions on the subject of responsibility, in effect often comes to the same thing: the jury, unable to understand these long instructions, simply disregard them entirely, and settle the question of whether the defendant was "crazy" or not upon "horse-sense."

Professor Wharton's observation that the question in criminal cases is not "insanity," but "responsibility," is likewise sound. But the legal concept of responsibility cannot be looked upon as an arbitrary formula, wholly unrelated to facts. It is not a royal road to wisdom, making clear and simple in law matters which are involved and difficult in fact. The New Hampshire court is therefore justified in insisting that in so far as legal theory conflicts with science, it is the law that must retreat, instead of assailing the scientists as visionaries who would overturn settled principles of law.

⁴⁴ See p. 128.

state.⁴⁵ In most states, the rule adopted in New Hampshire has never been taken notice of by the courts, and in some states, where counsel have urged its adoption, it has been definitely rejected.⁴⁶ The rule is impractical, the California court has said in rejecting one such proposal, for "however slight the defect, only Omniscience can say whether the act would have been committed had the taint not existed."⁴⁷

§3. FORMS OF MENTAL UNSOUNDNESS

The law makes no distinctions between various forms of mental unsoundness, as to the test of responsibility. The general test adopted in each jurisdiction (knowledge of right and wrong, or knowledge of right and wrong plus will power to resist the wrong) applies in all cases.

No matter what form of mental disorder is set up as a defense to crime, the test of responsibility always is whether the defendant was capable of knowing the wrongfulness of the act charged against him⁴⁸ (and, in the states which accept the irresistible impulse test, whether he had the will power to control his conduct in regard to it).⁴⁹

It would serve no useful purpose, therefore, so far as stating the law is concerned,⁵⁰ to discuss at length the various types of

⁴⁵ *Wilson v. State* (1911) 9 Ga. App. 274, 285, 70 S.E. 1128.

⁴⁶ *People v. Hubert* (1897) 119 Cal. 216, 51 Pac. 329; *State v. Craig* (1909) 52 Wash. 66, 100 Pac. 167; *Eckert v. State* (1902) 114 Wis. 160, 89 N.W. 826.

⁴⁷ *People v. Hubert, supra*.

⁴⁸ *State v. Arnold* (1909) 79 Kans. 533, 100 Pac. 64; *State v. White* (1922) 112 Kans. 83, 86, 209 Pac. 660; *State v. Scott* (1889) 41 Minn. 365, 43 N.W. 62; *Grisson v. State* (1884) 62 Miss. 167; *Ford v. State* (1896) 73 Miss. 734, 19 So. 665; *Smith v. State* (1909) 95 Miss. 786, 49 So. 945; *State v. Erb* (1881) 74 Mo. 199.

⁴⁹ *Parsons v. State* (1886) 81 Ala. 577, 2 So. 854; *State v. Kelsie* (1919) 93 Vt. 450, 108 Atl. 391.

⁵⁰ No discussion of the law, however, can be content merely to state the arbitrary legal rule, without some consideration of the background

mental disorder. The general test current in the particular state has been held to apply to cases of dementia praecox,⁵¹ epilepsy,⁵² feeble-mindedness,⁵³ paranoia,⁵⁴ psychopathic personality,⁵⁵ senile dementia,⁵⁶ shell shock,⁵⁷ somnolentia and somnambu-

of facts in which it must function. The legal tests of responsibility do not operate *in vacuo*; they must be applied to actual cases of mental disease, and if the notions of mental disease upon which they are based are scientifically unsound, they should be revised to accord with fact. The writer in this study has in various places pointed out briefly some of the scientific criticisms of the legal tests, but a full discussion of the soundness or unsoundness of these tests in the light of modern psychiatry and psychopathology cannot be attempted. The outstanding work on that subject is Dr. S. Sheldon Glueck's *Mental Disorder and the Criminal Law* (1925), particularly chaps. ix and x.

⁵¹ *State v. Jones* (1926) 191 N.C. 753, 133 S.E. 81.

⁵² *Taylor v. U.S.* (1895) 7 App. D.C. 27; *Genz v. State* (1896) 58 N.J.L. 482, 34 Atl. 816; *People v. Magnus* (1915) 92 Misc. Rep. 80, 155 N.Y. Supp. 1013.

⁵³ *Anderson v. State* (1922) 209 Ala. 36, 95 So. 171; *Chriswell v. State* (1923) 171 Ark. 255, 283 S.W. 981; *People v. Hurley* (1857) 8 Cal. 390; *Travers v. U.S.* (1895) 6 App. D.C. 450, 464; *Studstill v. State* (1849) 7 Ga. 2; *Rogers v. State* (1907) 128 Ga. 67, 57 S.E. 227; *Goosby v. State* (1922) 153 Ga. 496, 112 S.E. 467; *People v. Marquis* (1931) 344 Ill. 261, 176 N.E. 314; *Wartena v. State* (1886) 105 Ind. 445, 5 N.E. 20; *Robinson v. State* (1887) 113 Ind. 510, 16 N.E. 184; *Conway v. State* (1888) 118 Ind. 482, 21 N.E. 285; *State v. Flowers* (1897) 58 Kans. 702, 50 Pac. 938; *Farris v. Comm.* (1886) (Ky.) 1 S.W. 729; *Fitzpatrick v. Comm.* (1883) 81 Ky. 357; *Bast v. Comm.* (1907) 124 Ky. 747, 99 S.W. 978; *Maulding v. Comm.* (1916) 172 Ky. 370, 189 S.W. 251; *State v. Tapie* (1931) 173 La. 780, 138 So. 665; *State v. Palmer* (1901) 161 Mo. 152, 61 S.W. 651; *State v. Schlaps* (1927) 78 Mont. 560, 254 Pac. 858; *Nelson v. State* (1902) 43 Tex. Crim. 553, 67 S.W. 320; *Cox v. State* (1910) 60 Tex. Crim. 471, 132 S.W. 125; *Craven v. State* (1923) 93 Tex. Crim. 328, 247 S.W. 515; *McKenny v. State* (1926) 105 Tex. Crim. 353, 288 S.W. 465; *Rogers v. State* (1905) 77 Vt. 454, 61 Atl. 489; *State v. Kelsie* (1919) 93 Vt. 450, 108 Atl. 391; *State v. Schafer* (1930) 156 Wash. 240, 286 Pac. 833.

⁵⁴ *Hankins v. State* (1917) 133 Ark. 38, 201 S.W. 832.

⁵⁵ *Anderson v. State* (1922) 209 Ala. 36, 95 So. 171; *People v. Moran* (1928) 249 N.Y. 179, 163 N.E. 553; *Comm. v. Devereaux* (1926) 257 Mass. 391, 153 N.E. 881.

⁵⁶ *State v. Hadley* (1925) 65 Utah 109, 234 Pac. 940.

⁵⁷ *People v. Gilberg* (1925) 197 Cal. 306, 240 Pac. 1000.

lism,⁵⁸ temporary insanity,⁵⁹ and other forms of mental disorder.

Disorders characterized by delusions, as we have seen,⁶⁰ have been regarded by some courts rather as exceptions to the general rule. The special rule which these courts lay down, however, that a person suffering from delusions is to be judged as if his delusions were true, is not, it seems, considered by these courts as inconsistent with the right and wrong test, and so cannot really be said to constitute an exception to the general test. A real exception, however, seems to be the rule followed in Georgia,⁶¹ which makes absence of will power a defense in cases of delusion, though not in other cases of insanity.

Paranoia, especially in its second or "persecutory" stage, has been discussed in some cases (particularly in Arkansas and Illinois) as a form of insanity requiring a special rule of law, and the rule has accordingly been adopted in these cases that while knowledge of right and wrong is a correct test in most cases, where the evidence tends to show that the defendant was afflicted with paranoia, the irresistible impulse test must be added.⁶² In later cases, however, both the Arkansas and the Illinois courts have applied this irresistible impulse test to other cases of insanity, as well as to those in which there was evidence of paranoia.⁶³

⁵⁸ *Fain v. Comm.* (1879) 78 Ky. 183; *Tibbs v. Comm.* (1910) 138 Ky. 558, 128 S.W. 871, 28 L.R.A. (N.S.) 665.

⁵⁹ *Braham v. State* (1905) 143 Ala. 28, 38 So. 919; *People v. Ford* (1902) 138 Cal. 140, 70 Pac. 1075; *People v. Keyes* (1918) 178 Cal. 794, 175 Pac. 6; *State v. Alie* (1918) 82 W. Va. 601, 96 S.E. 1011.

⁶⁰ *Ante*, p. 69 *et seq.*

⁶¹ See p. 117.

⁶² *Bell v. State* (1915) 120 Ark. 530, 553, 180 S.W. 186; *People v. Low-hone* (1920) 292 Ill. 32, 126 N.E. 620.

⁶³ Neither the Arkansas nor the Illinois courts have expressly decided that the test should be so extended, but both have done so in fact. *Diggs v. State* (1916) 126 Ark. 455, 190 S.W. 448; *Kelley v. State* (1920) 146 Ark. 509, 226 S.W. 137; *Travis v. State* (1923) 160 Ark. 215, 254 S.W. 464; *People v. Krauser* (1925) 315 Ill. 485, 146 N.E. 593.

Intoxication. The courts have drawn a distinction between intoxication, the immediate effect of indulgence in alcoholic spirits, and insanity, resulting from long continued habits of imbibing alcoholics. Voluntary intoxication, it is generally agreed, is no excuse for crime;⁶⁴ and in most states, this is true

⁶⁴ *United States*: Perkins v. U.S. (1915) 228 Fed. 408, 415; *Alabama*: Kilpatrick v. State (1925) 213 Ala. 358, 104 So. 656; *Arizona*: Brimhall v. State (1927) 31 Ariz. 522, 255 Pac. 165; *California*: People v. Goodrum (1916) 31 Cal. App. 430, 160 Pac. 690; *Colorado*: Seiwald v. People (1919) 66 Colo. 332, 182 Pac. 20; *Connecticut*: State v. Johnson (1873) 40 Conn. 136; State v. Swift (1889) 57 Conn. 496, 18 Atl. 664; *Delaware*: State v. Thomas (1878) Houston Crim. Cas. 511; State v. Hand (1894) 1 Marv. 545, 41 Atl. 192; *District of Columbia*: Harris v. U.S. (1896) 8 App. D.C. 20; *Florida*: Cochran v. State (1913) 65 Fla. 91, 98, 61 So. 187; Hall v. State (1919) 78 Fla. 420, 83 So. 513; *Georgia*: Code (1910), vol. ii, Penal Code, §39; Peek v. State (1922) 155 Ga. 49, 116 S.E. 629; *Idaho*: State v. Rigley (1900) 7 Ida. 292, 62 Pac. 679; *Illinois*: People v. Brown (1927) 326 Ill. 640, 158 N.E. 403; *Indiana*: Aszman v. State (1889) 123 Ind. 347, 24 N.E. 123; *Iowa*: State v. Patton (1928) 206 Iowa 1347, 221 N.W. 952; *Kansas*: State v. Guthridge (1913) 88 Kans. 846, 129 Pac. 1143; *Kentucky*: Fleenor v. Comm. (1927) 221 Ky. 175, 298 S.W. 376; Abbott v. Comm. (1930) 234 Ky. 423, 28 S.W. (2d) 486; *Louisiana*: State v. Kraemer (1897) 49 La. An. 766, 22 So. 254; State v. Haab (1900) 105 La. 230, 29 So. 725; *Massachusetts*: Comm. v. Malone (1873) 114 Mass. 295; *Michigan*: People v. Garbutt (1868) 17 Mich. 9; Roberts v. People (1870) 19 Mich. 401; *Missouri*: State v. Jordan (1920) 285 Mo. 62, 225 S.W. 905; State v. Witham (1926) (Mo. Sup.) 281 S.W. 32; *Nebraska*: Schlencker v. State (1879) 9 Neb. 241; *New Jersey*: State v. Letter (1926) 4 N.J. Misc. R. 395, 133 Atl. 46; State v. Di Canio (1927) 104 N.J.L. 188, 138 Atl. 923; *New York*: Flanigan v. People (1881) 86 N.Y. 554; *North Carolina*: State v. Trott (1926) 190 N.C. 674, 130 S.E. 627; *Ohio*: Rucker v. State (1928) 119 Ohio St. 189, 162 N.E. 802; *Oklahoma*: Cheadle v. State (1915) 11 Okla. Crim. 566; Collier v. State (1920) 17 Okla. Crim. 139, 186 Pac. 963; *Oregon*: State v. Trapp (1910) 56 Ore. 588, 109 Pac. 1094; *Pennsylvania*: Comm. v. Cleary (1892) 148 Pa. 26, 23 Atl. 1110; Comm. v. Detweiler (1910) 229 Pa. 304, 78 Atl. 271; *South Carolina*: State v. Paulk (1882) 18 S.C. 514; State v. McCants (1884) 1 Spears 384; *Texas*: Complete Stat. (1928) Penal Code, Art. 36; Carpenter v. State (1927) 108 Tex. Crim. 291, 300 S.W. 83; *Vermont*: State v. Tatro (1878) 50 Vt. 483; *Virginia*: Johnson v. Comm. (1923) 135 Va. 524, 115 S.E. 673, 30 A.L.R. 755; *Washington*: Rem. Comp. Stat. (1922), §2258; State v.

even though the intoxication may result in temporary insanity, rendering the person for the time unconscious of his acts, or incapable of distinguishing right from wrong.⁶⁵ In a few states, on the other hand, temporary insanity arising from the use of intoxicating liquor is regarded the same as insanity aris-

Beaman (1927) 143 Wash. 281, 255 Pac. 91; *West Virginia*: State *v.* Robinson (1882) 20 W. Va. 713; State *v.* Kidwell (1907) 62 W. Va. 466, 59 S.E. 494; *Wisconsin*: Cross *v.* State (1882) 55 Wis. 261, 12 N.W. 425; Hempton *v.* State (1901) 111 Wis. 127, 86 N.W. 596; *Wyoming*: Gustavenson *v.* State (1902) 10 Wyo. 300, 323, 68 Pac. 1006.

Involuntary drunkenness, however, is a defense. Burrows *v.* State (1931) 38 Ariz. 99, 297 Pac. 1029; Seiwald *v.* People (1919) 66 Colo. 332, 182 Pac. 20; Bartholomew *v.* People (1882) 104 Ill. 601, 44 Am. Rep. 97; Johnson *v.* Comm. (1923) 135 Va. 524, 115 S.E. 673, 30 A.L.R. 755. But intoxication is involuntary only if the intoxicant is imbibed as a result of mistake or fraud, or lack of judgment or volition. Johnson *v.* Comm., *supra*; Bo. land *v.* State (1923) 158 Ark. 37, 249 S.W. 591; Choate *v.* State (1921) 19 Okla. Crim. 169, 197 Pac. 1060.

⁶⁵ *United States*: U.S. *v.* McGlue (1851) 1 Curtis 1; U.S. *v.* Drew (1828) 25 Fed. Cas. No. 14,993, 5 Mason 28; *Alabama*: State *v.* Bullock (1848) 13 Ala. 413; Engelhardt *v.* State (1889) 88 Ala. 100, 7 So. 154; *Arkansas*: Byrd *v.* State (1905) 76 Ark. 286, 88 S.W. 974; *California*: People *v.* Travers (1891) 88 Cal. 233, 26 Pac. 88; People *v.* Keyes (1918) 178 Cal. 794, 175 Pac. 6; *Delaware*: State *v.* Davis (1885) 9 Hous. 407, 33 Atl. 55; State *v.* Kavanaugh (1902) 20 Del. 131, 53 Atl. 335; *Florida*: Garner *v.* State (1891) 28 Fla. 113, 9 So. 835; *Georgia*: Beck *v.* State (1886) 76 Ga. 452; *Illinois*: Upstone *v.* People (1883) 109 Ill. 169; *Indiana*: Wagner *v.* State (1888) 116 Ind. 181, 18 N.E. 833; *Kansas*: State *v.* Rumble (1909) 81 Kans. 16, 105 Pac. 1; *Kentucky*: Perciful *v.* Comm. (1925) 212 Ky. 673, 279 S.W. 1062; Lindsay *v.* Comm. (1929) 230 Ky. 718, 20 S.W. (2d) 738; *Louisiana*: State *v.* Haab (1900) 105 La. 230, 29 So. 725; *Missouri*: State *v.* Riley (1890) 100 Mo. 493, 13 S.W. 1063; *Nebraska*: Schlencker *v.* State (1879) 9 Neb. 241; *Nevada*: State *v.* Thompson (1877) 12 Nev. 140; *New York*: People *v.* Rogers (1858) 18 N.Y. 9, 72 Am. Dec. 484; Flanigan *v.* People (1881) 86 N.Y. 554, 40 Am. Rep. 556; *Oklahoma*: Collier *v.* State (1920) 17 Okla. Crim. 139, 186 Pac. 963, 12 A.L.R. 839; *Oregon*: State *v.* Trapp (1910) 56 Ore. 588, 109 Pac. 1094; *Virginia*: Boswell *v.* Comm. (1871) 20 Grat. 860; *Washington*: State *v.* Beaman (1927) 143 Wash. 281, 255 Pac. 91; *West Virginia*: State *v.* Kidwell (1907) 62 W. Va. 466, 59 S.E. 494; State *v.* Phillips (1917) 80 W. Va. 748, 93 S.E. 828.

ing from any other cause; if it is so pronounced as to come within the legal test of irresponsibility, it is a defense.⁶⁶ Formerly, intoxication was held to aggravate the offense,⁶⁷ but this is no longer law.⁶⁸

While voluntary intoxication does not excuse crime, the great majority of courts hold that where the crime charged requires a specific intent, if the defendant was so intoxicated as to be incapable of entertaining that intent, he cannot be convicted⁶⁹ of

⁶⁶ "If a man by drunkenness brings on a degree of madness, even for a time, which would relieve him from responsibility if it had been caused in any other way, then he would not be criminally responsible. The man is a madman, and is to be treated as such, although his madness is only temporary." *Martin v. State* (1911) 100 Ark. 189, 139 S.W. 1122. *Accord: Harmon v. State* (1930) 23 Ala. App. 468, 126 So. 896; *Stuart v. State* (1873) 60 Tenn. 178. As to delirium tremens, see p. 93.

In Michigan and North Carolina, it has been held that if the defendant, because of a dormant tendency to insanity, or other mental or physical peculiarity, is extraordinarily affected by liquor, so that he becomes much more frantic and deranged when drunk than ordinary men, and if, knowing that fact, he nevertheless does drink, he is responsible, even though this extraordinary derangement does result and he is rendered incapable of knowing right from wrong or controlling his actions. *Roberts v. People* (1870) 19 Mich. 401; *State v. Wilson* (1889) 104 N.C. 868, 10 S.E. 315. But, the Michigan court has added, if he is ignorant of this tendency, and has no reason to foresee that such extraordinary result is likely to follow from drinking, he is not liable for such unusual results; in such case, the same rule applies as in insanity produced by any other cause. *Roberts v. People, supra*.

⁶⁷ *Coke, Litt.*, p. 247a; *U.S. v. Claypool* (1882) 14 Fed. 127; *Weick v. Comm.* (1924) 201 Ky. 632, 258 S.W. 90; *State v. Thompson* (1834) *Wright's Ohio Rep.* 617.

⁶⁸ *McIntyre v. People* (1865) 38 Ill. 514; *State v. Donovan* (1883) 61 Ia. 369, 16 N.W. 206; *State v. Newman* (1925) 157 La. 564, 102 So. 671.

⁶⁹ *Alabama: Cleveland v. State* (1888) 86 Ala. 1, 5 So. 426; *Chatham v. State* (1890) 92 Ala. 47, 9 So. 607; *Whitten v. State* (1896) 115 Ala. 72, 22 So. 483; *State v. Massey* (1924) 20 Ala. App. 56, 100 So. 625; *Arkansas: Chrisman v. State* (1891) 54 Ark. 283, 15 S.W. 889, 26 A.S.R. 44; *California: People v. Burkhart* (1931) 211 Cal. 726, 297 Pac. 11; *Delaware: State v. Bacon* (1920) 1 W.W. Harr. 176, 112 Atl. 682; *Florida: Garner v. State* (1891) 28 Fla. 113, 9 So. 835, 29 A.S.R. 232; *Davis v. State* (1902)

the crime. This is provided by statute in some states.⁷⁰ It is not clear, however, how far the courts are willing to apply this principle. It is usually applied with reference to the specific requirements of deliberation and premeditation in first degree murder; where the defendant was, by reason of drunkenness, incapable of deliberating and premeditating, the offense, it is

44 Fla. 32, 44, 32 So. 822; *Hall v. State* (1919) 78 Fla. 420, 83 So. 513; *Illinois*: *People v. Brislane* (1920) 295 Ill. 241, 129 N.E. 185; *People v. Cochran* (1924) 313 Ill. 508, 145 N.E. 207; *People v. Bartz* (1931) 342 Ill. 56, 173 N.E. 779; *Indiana*: *Aszman v. State* (1889) 123 Ind. 347, 24 N.E. 123; *Booher v. State* (1901) 156 Ind. 435, 60 N.E. 156, 54 L.R.A. 391; *Kansas*: *State v. Guthridge* (1913) 88 Kans. 846, 848, 129 Pac. 1143; *Maine*: *State v. Siddall* (1926) 125 Me. 463, 134 Atl. 691; *Massachusetts*: *Comm. v. Parsons* (1907) 195 Mass. 560, 81 N.E. 291; *Michigan*: *Roberts v. People* (1870) 19 Mich. 401; *People v. Jones* (1924) 228 Mich. 426, 200 N.W. 158; *Nebraska*: *O'Grady v. State* (1893) 36 Neb. 320, 54 N.W. 556; *Head v. State* (1894) 43 Neb. 30, 61 N.W. 494; *New Jersey*: *Warner v. State* (1894) 56 N.J.L. 686, 29 Atl. 505; *North Carolina*: *State v. Foster* (1916) 172 N.C. 960, 90 S.E. 785; *State v. Ross* (1927) 193 N.C. 25, 136 S.E. 193; *North Dakota*: *State v. Koerner* (1899) 8 N.D. 292, 78 N.W. 981, 73 A.S.R. 752; *Ohio*: *Pigman v. State* (1846) 14 Ohio R. 555; *Rucker v. State* (1928) 119 O. St. 189, 162 N.E. 802; *Oklahoma*: *Derrisaw v. State* (1925) 29 Okla. Crim. 377, 234 Pac. 230; *Copperfield v. State* (1927) 37 Okla. Crim. 11, 255 Pac. 590; *Rhode Island*: *State v. Vanasse* (1919) 42 R.I. 278, 107 Atl. 85; *Tennessee*: *Pirtle v. State* (1849) 28 Tenn. 663; *West Virginia*: *State v. Phillips* (1917) 80 W. Va. 748, 93 S.E. 828, L.R.A. 1918A 1164; *Wisconsin*: *Cross v. State* (1882) 55 Wis. 261, 12 N.W. 425; *Hempton v. State* (1901) 111 Wis. 127, 86 N.W. 596; *Wyoming*: *Gustavenson v. State* (1902) 10 Wyo. 300, 68 Pac. 1006.

⁷⁰ The New York Penal Law provides: "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." N.Y. Consol. Laws (Cahill, 1930), chap. 41, §1220. This provision, in practically identical words, is also found in most of the western states: *Ariz. Rev. Code* (1928), §4487; *Cal. P.C.* (1931), §22; *Ida. Comp. Stat.* (1919), §8089; *Mont. Rev. Codes* (1921), §10728; *Nev. Rev.*

held, is reduced to murder in the second degree,⁷¹ or manslaughter.⁷² It has been held that the rule is limited to homicide cases,⁷³ but the majority rule is that intoxication may be shown in all cases of crimes requiring a specific intent, to negative the existence of such intent, and thus not merely to reduce the offense to a lower degree, but to require an acquittal where there is no lower degree.⁷⁴ Drunkenness has been held admissible in evidence to negative the specific intent without which there can be no robbery,⁷⁵ larceny,⁷⁶ attempt to rape,⁷⁷ burglary,⁷⁸ assault

Laws (1929), §9966; N.D. Comp. Laws (1913), §9208; Utah Comp. Laws (1917), §7910; Wash. Comp. Stat. (Rem., 1922), §2258. Wyoming also has a provision to the same effect: Wyo. Rev. Stat. (1931) §33-824.

⁷¹ *State v. Johnson* (1873) 40 Conn. 136; *State v. Swift* (1889) 57 Conn. 496, 18 Atl. 664; *State v. Treficanto* (1929) 106 N.J.L. 344, 146 Atl. 313; *People v. Mills* (1885) 98 N.Y. 176; *State v. English* (1913) 164 N.C. 497, 80 S.E. 72; *Comm. v. Detweiler* (1910) 229 Pa. 304, 78 Atl. 271; *Boswell v. Comm.* (1871) 20 Grat. (Va.) 860; *State v. Kidwell* (1907) 62 W. Va. 466, 59 S.E. 494; and cases cited in Wharton, *Criminal Law* (12th ed., 1932), §§69, 516.

⁷² *U.S. v. King* (1888) 34 Fed. 302; *U.S. v. Meagher* (1888) 37 Fed. 875; *State v. Rumble* (1909) 81 Kans. 16, 105 Pac. 1; *Tubby v. State* (1919) 15 Okla. Crim. 496, 178 Pac. 491.

⁷³ *State v. Shores* (1888) 31 W. Va. 491, 7 S.E. 413, 13 A.S.R. 875.

⁷⁴ *Slone v. Comm.* (1931) 238 Ky. 727, 43 S.W. (2d) 664. This seems to be true in the states where the matter is covered by statute. *Ante*, p. 90, note 70.

⁷⁵ *Terhune v. Comm.* (1911) 144 Ky. 370, 138 S.W. 274; *State v. Reagin* (1922) 64 Mont. 481, 210 Pac. 86.

⁷⁶ *Ryan v. U.S.* (1905) 26 App. D.C. 74 (*dictum*); *Brennon v. State* (1916) 169 Ky. 815, 185 Pac. 489; *State v. Koerner* (1899) 8 N.D. 292, 78 N.W. 981; *Copperfield v. State* (1927) 37 Okla. Crim. 11, 255 Pac. 590; *Collins v. State* (1902) 115 Wis. 596, 92 N.W. 266.

⁷⁷ *Whitten v. State* (1896) 115 Ala. 72, 22 So. 483; *Head v. State* (1894) 43 Neb. 30, 61 N.W. 494; *State v. Vanasse* (1919) 42 R.I. 278, 107 Atl. 85; *Reagan v. State* (1889) 28 Tex. App. 227, 12 S.W. 601.

⁷⁸ *Bruen v. People* (1903) 206 Ill. 417, 69 N.E. 24; *People v. Eggleston* (1915) 186 Mich. 510, 152 N.W. 944; *Vickery v. State* (1911) 62 Tex. Crim. 311, 137 S.W. 687, Ann. Cas. 1913C 514; *State v. Phillips* (1917) 80 W. Va. 748, 93 S.E. 828, L.R.A. 1918A 1164.

with intent to kill,⁷⁹ attempt to commit suicide,⁸⁰ and other crimes.⁸¹ A few states deny that intoxication is to be given any consideration in determining whether the act was done with the specific intent charged.⁸² In Texas, it is provided that neither intoxication nor temporary insanity produced by the voluntary recent use of ardent spirits constitutes an excuse for crime, but evidence of temporary insanity produced by such use of ardent spirits may be shown in mitigation of punishment.⁸³

Alcoholic Disorders. Insanity which is "fixed," "settled," or "permanent," and of which the use of alcoholics is but a remote cause, is distinguished by the courts from mere drunkenness and is deemed a defense to crime just like insanity arising from any other cause;⁸⁴ i.e., if so pronounced as to destroy knowledge of the nature and quality of the act, or of its wrongfulness,

⁷⁹ *State v. Pasnau* (1902) 118 Ia. 501, 92 N.W. 682; *Booher v. State* (1901) 156 Ind. 435, 60 N.E. 156, 54 L.R.A. 391.

⁸⁰ *Reg. v. Moore* (1852) 16 Jur. 750.

⁸¹ See *Slone v. Comm.* (1931) 238 Ky. 727, 43 S.W. (2d) 664 and cases cited in 16 Corpus Juris 107.

⁸² *Georgia*: *Estes v. State* (1875) 55 Ga. 30; *Vann v. State* (1889) 83 Ga. 44, 9 S.E. 945; *Bradberry v. State* (1930) 170 Ga. 859, 870, 154 S.E. 344, 351; *Missouri*: *State v. Jordan* (1920) 285 Mo. 62, 225 S.W. 905; *State v. Bushong* (1922) 246 S.W. 919; *State v. Comer* (1922) 296 Mo. 1, 247 S.W. 179; *Vermont*: *State v. Tatro* (1878) 50 Vt. 483. "Although there may be no criminal intent, the law will by construction supply same, this under the well-recognized principle that one who voluntarily assumes an attitude likely to produce harm to others, despite any specific intention to injure, is responsible for the consequences of his act." *State v. Jordan, supra*.

⁸³ *Tex. Complete Stat.* (1928) P.C., Art. 36; *Dodd v. State* (1918) 83 Tex. Crim. 160, 210 S.W. 1014; *Hooter v. State* (1920) 88 Tex. Crim. 265, 225 S.W. 1093; *Carpenter v. State* (1927) 108 Tex. Crim. 291, 300 S.W. 83. Intoxication cannot be shown to reduce the grade of the offense. *Davis v. State* (1929) 111 Tex. Crim. 476, 14 S.W. (2d) 842.

⁸⁴ *Alabama*: *Henningburg v. State* (1907) 153 Ala. 13, 45 So. 246; *Arkansas*: *Carty v. State* (1918) 135 Ark. 169, 204 S.W. 207; *California*: *People v. Findley* (1901) 132 Cal. 301, 64 Pac. 472; *People v. Goodrum*

etc., the defendant is not responsible. Delirium tremens, though not "settled" or "permanent" in its nature, is also regarded as mental disorder, and not as mere intoxication.⁸⁵ This rule

(1916) 31 Cal. App. 430, 160 Pac. 690; *Delaware*: State v. Hand (1894) 1 Marv. 545, 41 Atl. 192; *Florida*: Cochran v. State (1913) 65 Fla. 91, 98, 61 So. 187, 190; *Georgia*: Peek v. State (1922) 155 Ga. 49, 116 S.E. 629; *Illinois*: People v. Cochran (1924) 313 Ill. 508, 145 N.E. 207; *Indiana*: Fisher v. State (1878) 64 Ind. 435; *Kansas*: State v. Rumble (1909) 81 Kans. 16, 22, 105 Pac. 1; *Louisiana*: State v. Watson (1879) 31 La. Ann. 379; *Massachusetts*: Comm. v. Parsons (1907) 195 Mass. 560, 570, 81 N.E. 291; *Mississippi*: Kelly & Little's Case (1844) 3 S. & M. 518; *Missouri*: State v. Riley (1890) 100 Mo. 493, 13 S.W. 1063; *Nebraska*: Hill v. State (1894) 42 Neb. 503, 60 N.W. 916; *New York*: People v. Rogers (1858) 18 N.Y. 9, 72 Am. Dec. 484; *North Carolina*: State v. English (1913) 164 N.C. 497, 80 S.E. 72; State v. Lee (1929) 196 N.C. 714, 146 S.E. 858; *Ohio*: Rucker v. State (1928) 119 Ohio 189, 162 N.E. 802; *Oklahoma*: Collier v. State (1920) 17 Okla. Crim. 139, 186 Pac. 963, 12 A.L.R. 839; *Oregon*: State v. Trapp (1910) 56 Ore. 588, 591, 109 Pac. 1094; *South Carolina*: State v. McCants (1843) 1 Spears 384; State v. Driggers (1909) 84 S.C. 526, 66 S.E. 1042, 19 Ann. Cas. 1166, 137 A.S.R. 855; *Tennessee*: Cornwell v. State (1827) 8 Tenn. (1 M. & Y.) 147; *Texas*: Evers v. State (1892) 31 Tex. Crim. 318, 20 S.W. 744, 18 L.R.A. 421; Truett v. State (1914) 74 Tex. Crim. 284, 168 S.W. 523; *United States*: Perkins v. U.S. (1915) 228 Fed. 408, 415; *Virginia*: Boswell v. Comm. (1871) 20 Grat. 860; *West Virginia*: State v. Kidwell (1907) 62 W. Va. 466, 59 S.E. 494, 13 L.R.A. (N.S.) 1024; *Wisconsin*: Terrill v. State (1889) 74 Wis. 278, 42 N.W. 243.

⁸⁵ *Alabama*: Parrish v. State (1903) 139 Ala. 16, 48, 36 So. 1012; *Delaware*: State v. Hand (1894) 1 Marv. 545, 41 Atl. 192; State v. Kavanaugh (1902) 20 Del. 131, 53 Atl. 335; *Florida*: Garner v. State (1891) 28 Fla. 113, 153, 9 So. 835; *Kansas*: State v. O'Neil (1893) 51 Kans. 651, 678, 33 Pac. 287; *Louisiana*: State v. Watson (1879) 31 La. Ann. 379; State v. Kraemer (1897) 49 La. Ann. 766, 22 So. 254; *Michigan*: People v. Toner (1922) 217 Mich. 640, 187 N.W. 386; *New York*: People v. Carpenter (1886) 102 N.Y. 238, 6 N.E. 584; *Ohio*: Maconnehey v. State (1855) 5 O.St. 77; *Oklahoma*: McCarter v. State (1918) 14 Okla. Crim. 305, 170 Pac. 712; Collier v. State (1920) 17 Okla. Crim. 139, 186 Pac. 963, 12 A.L.R. 839; *Rhode Island*: State v. Quigley (1904) 26 R.I. 263, 58 Atl. 905, 67 L.R.A. 322; *South Carolina*: State v. Driggers (1909) 84 S.C. 526, 66 N.E. 1042, 19 Ann. Cas. 1166, 137 A.S.R. 855; *Texas*: Kelley v. State (1892) 31 Tex. Crim. 216, 20 S.W. 357; *West Virginia*: State v. Kidwell

seems sound, both from the medical⁸⁶ and the legal⁸⁷ point of view.

The same rules apply to mental aberrations resulting from the use of drugs, as from the use of alcohol. Mere temporary derangement, resulting from the voluntary taking of narcotics, is, like mere temporary intoxication or insanity resulting from drinking, no defense to crime. It is a defense only if the drug habit has produced a fixed or permanent mental disorder.⁸⁸

Feeble-mindedness: Intelligence Tests. The fact that a defendant is weak-minded, it is held, is no excuse if his deficiency is not such as to bring him within the legal test of irresponsibility current in the particular jurisdiction.⁸⁹ Since the advent in recent years of the intelligence tests for calculating mental age, counsel have in a number of cases urged that a defendant of

(1907) 62 W. Va. 466, 59 S.E. 494, 13 L.R.A. (N.S.) 1024; *Wisconsin: French v. State* (1896) 93 Wis. 325, 67 N.W. 706.

⁸⁶ "Delirium tremens is not to be considered as a simple alcoholic intoxication, a sort of belated drunkenness caused by the accumulation of the poison in the organism. Its clinical aspect in fact differs radically from acute intoxication." Rosanoff, *Manual of Psychiatry* (6th ed., 1927), p. 225.

⁸⁷ The reasons for regarding delirium tremens as insanity rather than as mere drunkenness are stated by Wharton as follows: "(1) That *delirium tremens* is not the *intended* result of drink in the same way that drunkenness is; (2) That there is no possibility that *delirium tremens* will be voluntarily generated in order to afford a cloak for a particular crime; (3) That so far as original cause is concerned, *delirium tremens* is not peculiar in being the offspring of indiscretion or guilt, for such is the case with many other kinds of insanity. . . . It is the result, like many other manias, of prior vicious indulgences; but it differs from intoxication in being shunned rather than courted by the patient, and in being incapable of voluntary assumption for the purpose of covering guilt." Wharton, *Criminal Law* (12th ed., 1932), §65.

⁸⁸ *Perkins v. U.S.* (1915) 228 Fed. 408, 415; *Strickland v. State* (1911) 137 Ga. 115, 72 S.E. 922; *State v. Morris* (1914) 263 Mo. 339, 353, 172 S.W. 603; *Edwards v. State* (1897) 38 Tex. Crim. 386, 43 S.W. 112; *Lawrence v. State* (1912) 65 Tex. Crim. 93, 143 S.W. 636.

⁸⁹ For cases, see p. 85, note 53.

low mental age should be judged just as a child of that chronological age would be; e.g., if a defendant is found to have a mentality of less than fourteen years, he should be presumed incapable of criminal intent, and if his mentality is found to be of less than seven years, the presumption should be conclusive. It is interesting to notice that such a rule would be a return to the test laid down by Lord Hale three hundred years ago.⁹⁰ Courts have been unanimous, however, in refusing to apply the rule presuming children incapable of criminal intent to the case of adults of low mental age.⁹¹ In fact, it has been held that mere weakness of mind is incompetent to be proved, where there is no evidence that the defendant is either an idiot, lunatic,

⁹⁰ The child of fourteen years test. *Ante*, p. 19. This test was followed in an early Connecticut case, *State v. Richards* (1873) 39 Conn. 591, where the judge, in a rambling charge, though stating that he could give "no precise rule," nevertheless commended Lord Hale's rule that "inasmuch as children under fourteen years of age are prima facie incapable of crime, imbeciles ought not to be held responsible criminally unless of capacity equal to that of ordinary children of that age." But this test the judge immediately added was "imperfect," because (1) no two people have the same idea of the ordinary capacity of a fourteen-year-old child, and (2) there can be no accurate comparison between the normal but immature mind of a child, and the abnormal, unhealthy, and shriveled mind of an imbecile.

⁹¹ *Chriswell v. State* (1926) 171 Ark. 255, 259, 283 S.W. 981; *People v. Day* (1926) 199 Cal. 78, 248 Pac. 250; *State v. Saxon* (1913) 87 Conn. 5, 16, 86 Atl. 590; *State v. Wade* (1921) 96 Conn. 238, 251, 113 Atl. 458; *Comm. v. Stewart* (1926) 255 Mass. 9, 151 N.E. 74; *Comm. v. Trippi* (1929) 268 Mass. 227, 167 N.E. 354; *State v. Schilling* (1920) 95 N.J.L. 145, 112 Atl. 400; *Rodgers v. State* (1894) (Tex. Cr. R.) 28 S.W. 685; *State v. Kelsie* (1919) 93 Vt. 450, 108 Atl. 391.

Although the courts have thus far refused to apply the presumption of law in favor of children to adults of low mental age, it should be pointed out that the modern psychometric tests are becoming of increasing importance as a means of gauging cognitive ability. They may be imperfect as a criterion of the person's ability to obey the law, because they only purport to measure intellectual capacity, without considering volition or emotion. But the classic right and wrong test of the law has always done exactly the same thing—looked to intellectual capacity only. While they

or insane.⁹² And where the evidence only shows that the defendant was of a low order of intelligence, or congenitally a mental and moral degenerate, but that he probably knew right from wrong, it has been held proper for the court to refuse to submit the issue of insanity to the jury.⁹³ Indeed, the Texas court has held it reversible error to give instructions on insanity, where the evidence merely showed that the defendant was not very strong-minded.⁹⁴

Borderline Cases: Psychoneuroses and Psychopathic Personalities. Perhaps the most difficult cases with which the law has to deal are the so-called "borderline" cases of mental disorder—the psychoneurotics, or emotionally maladjusted individuals, suffering from neurasthenia, hysteria, or psychasthenia; the psychopathic personalities, or emotionally unstable persons, exhibiting pathological character anomalies; and the mentally peculiar, including the cranks, fanatics, crack-brained visionaries and reformers, and unsuccessful inventors. These types all differ one from another, but in general they are characterized by strong emotion, manifesting itself in abnormal irritability, bursts of temper, and sudden moods. They are usually self-centered, strong-headed, and lacking in discipline. Some, espe-

may be misleading if relied on exclusively, the value of intelligence tests is testified to by the most eminent of modern psychiatrists. Dr. William Healy has said that "there can be no doubt that the safest and most practical definitions for feeble-mindedness and its subclasses are to be made by combining the statement of known social disabilities or special capabilities, with the findings of accredited age tests." *The Individual Delinquent* (1915), p. 450.

⁹² *Dean v. State* (1894) 105 Ala. 21, 17 So. 28; *Studstill v. State* (1849) 7 Ga. 2; *Rogers v. State* (1907) 128 Ga. 67, 57 S.E. 227; *Goosby v. State* (1922) 153 Ga. 496, 112 S.E. 467; *Fitzpatrick v. Comm.* (1883) 81 Ky. 357; *State v. Schlaps* (1927) 78 Mont. 560, 254 Pac. 858; *Comm. v. Trippi* (1929) 268 Mass. 227, 167 N.E. 354.

⁹³ *Powell v. State* (1872) 37 Tex. 348; *Mitchell v. State* (1907) 52 Tex. Crim. 37, 106 S.W. 124.

⁹⁴ *Griffith v. State* (1904) 47 Tex. Crim. 64, 78 S.W. 347; *Kirby v. State* (1906) 49 Tex. Crim. 517, 93 S.W. 1030.

cially of the psychopathic personalities, seem to be strikingly prone to criminal conduct. They are reckless and unruly, of uncontrollable temper, and sometimes of such pronounced moral perversity, criminality, and sexuality as to indicate clearly an underlying pathological condition. Others, as the psychasthenics, may be obsessed with uncontrollable ideas and impulses.⁹⁵ But in the main, these borderline cases seldom exhibit impulses which are absolutely irresistible, and none of them is incapable of distinguishing right from wrong. Accordingly, under the current tests of responsibility, such disturbances generally do not serve to relieve the person from responsibility for his criminal acts.⁹⁶

In recent years, however, statutes have been enacted in a few states, under which the court may have a defendant committed if he appears to be a "defective delinquent" or a "mental defective." These statutes will be referred to in a later chapter.⁹⁷

Deafness and Dumbness as a Test of Idiocy. In the older common law, a person who was born deaf, dumb, and blind (and

⁹⁵ See Fisher, *Introduction to Abnormal Psychology* (1929), chaps. viii-xi; Rosanoff, *Manual of Psychiatry* (6th ed., 1927), chaps. vi and vii; and Pressey, *Mental Abnormality and Deficiency* (1927), chap. vii; Ball and Kidd, "The Relation of Law and Medicine in Mental Disease" (1921), 9 *Cal. Law Rev.* 276.

⁹⁶ "While a slight departure from a well balanced mind may be pronounced insanity in medical science, yet such a rule cannot be recognized in the administration of the law when a person is on trial for the commission of a high crime." *Taylor v. Comm.* (1885) 109 Pa. 262, 271. That this case, though almost fifty years old, still represents the law can be seen by comparing the statement of the New York Court of Appeals in *People v. Moran* (1928) 249 N.Y. 179, 163 N.E. 553: "The defendant is a 'psychopathic inferior,' a man of low and unstable mentality, and, in all probability, a sufferer from epilepsy. . . . It is the law of New York, made binding upon the court by the enactment of a statute, that a youth of that order of mentality shall suffer the penalty of death if guilty of the crime of murder." See also *People v. Williams* (1922) 218 Mich. 697, 188 N.W. 413; *Woodruff v. State* (1932) 164 Tenn. 530, 51 S.W. (2d) 843.

⁹⁷ See *post*, p. 382 *et seq.*

perhaps also one born deaf and dumb merely) was presumed to be an idiot,⁹⁸ but this presumption is no longer indulged.⁹⁹ It remains true, of course, that a person born deaf and dumb lacks the normal facilities for learning, and this is even more true of those who are blind in addition. Unless special efforts are made to teach such persons, they are likely to remain mentally as undeveloped as idiots. However, it is possible to teach these unfortunates, as the well-known life of Helen Keller illustrates, and it is a question of fact in each case whether the person in question had sufficient intelligence at the time of the act charged to be held responsible under the legal test, and whether he is capable of understanding the proceedings at the trial, and by writing or signs to adequately present his defense; there is no legal presumption in the matter.

§4. MENTAL DISORDER AS GROUND FOR REDUCING PUNISHMENT

Mental Disorder as a Mitigating Circumstance. It has sometimes been argued that the borderline cases of mental unsoundness, though not sufficient to come within the legal tests of irresponsibility, and so not sufficient to entitle the defendant to an acquittal, should nevertheless serve as a mitigation of the offense, and reduce the punishment. This contention has ap-

⁹⁸ "A man deaf and dumb from his birth is non compos; but not if by accident. Yet deaf, blind and dumb by casualty is non compos." 1 Dyer 56a. "But a man who is born deaf, dumb and blind, is looked upon by the law as in the same state with an idiot; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas." 1 Bl. Comm. 304.

⁹⁹ "The presumption that a person deaf and dumb from birth should be deemed an idiot, does not seem to obtain in modern practice, at least in the United States." *State v. Howard* (1893) 118 Mo. 127, 24 S.W. 41. "In the earlier history of the law, a person who was born deaf and dumb, was considered to be an idiot. That period has long passed, and the question as to their legal ability to make a contract is placed on its proper ground—their mental capacity." *Barnett v. Barnett* (1854) 1 Jones Eq. (N.C.) 221.

peared in the form of several legal lines of reasoning. We shall consider it first as a simple, direct proposition that the "border-line" types, or the "partially insane," should be less severely punished than sane persons. These individuals, it is said, may not be incapable of understanding the wrongfulness of their acts, or of controlling their impulses, but they are definitely less capable of doing so than normal persons, and the law should make allowance for this deficiency by punishing them less harshly than normal offenders.

This rule, that where a defendant is somewhat disordered mentally, but not to such a degree as to relieve him from responsibility for crime, his punishment should be reduced, has been adopted in the codes of some continental countries,¹⁰⁰ and it has the support of certain English and American writers,¹⁰¹ but it has not been accepted in our law.¹⁰² An exception perhaps exists in Nebraska, where feeble-mindedness and mental disease have been held grounds for mitigating punishment under a statute giving the Supreme Court power to reduce a sentence which it deems excessive.¹⁰³

¹⁰⁰ The Italian Penal Code, for example, provides (Art. 47) that if the defendant's mental infirmity was "such as greatly to diminish responsibility, without, however, excluding it, the punishment prescribed for the crime committed is to be reduced."

Similar provisions are found in the codes of Denmark, Finland, Greece, Japan, Norway, Sweden, and the Swiss cantons. *Vergleichende Darstellung des deutschen und ausländischen Strafrechts* (1908), vol. i, p. 53 *et seq.*

¹⁰¹ Sullivan, *Crime and Insanity* (1924), p. 251; Glueck, *Mental Disorder and the Criminal Law* (1925), pp. 384, 481; Jacoby, *The Unsound Mind and the Law* (1918), pp. 48, 82.

¹⁰² *Sage v. State* (1883) 91 Ind. 141; *Warner v. State* (1887) 114 Ind. 137, 16 N.E. 189; *Comm. v. Wireback* (1899) 190 Pa. 138, 42 Atl. 542; *Woodruff v. State* (1932) 164 Tenn. 530, 51 S.W. (2d) 843; *Hogue v. State* (1912) 65 Tex. Crim. 539, 146 S.W. 905; *Kirby v. State* (1912) 68 Tex. Crim. 63, 73, 150 S.W. 455.

¹⁰³ *Hamblin v. State* (1908) 81 Neb. 148, 115 N.W. 850; *Muzik v. State* (1916) 99 Neb. 496, 156 N.W. 1056; *Cryderman v. State* (1917) 101 Neb. 85, 161 N.W. 1045.

It is a rule that does not fit in well with the basic principle of our neo-classical penal philosophy, that all men are equal before the law, and that all persons committing a given criminal act should receive the same punishment, regardless of conditions or circumstances. Certain circumstances, such as "heat of passion,"¹⁰⁴ are permitted to mitigate an offense, but they are judged by objective standards, and a purely subjective circumstance, like mental disorder, is not given any such mitigating effect.¹⁰⁵

Mental Disorder Reducing Grade of Offense by Negating Specific Intent. A doctrine more in harmony with common law principles, which has been accepted in a few states, is that mental unsoundness, though not so pronounced as to entitle the defendant to an acquittal under the legal test of responsibility,

¹⁰⁴ "Heat of passion," aroused by adequate provocation, is held to reduce a homicide from murder to manslaughter. But the yardstick by which the law measures the adequacy of the provocation is wholly objective—to have this mitigating effect, the provocation must have been such as would arouse the passion of a reasonable man. See cases cited *post*, p. 103, note 115.

Unlike the rule permitting intoxication to reduce the degree of an offense, the rule concerning "heat of passion" is truly a rule of mitigation. Intoxication is nowhere considered a mitigating circumstance. It is not a natural human frailty, which the law indulges. It serves to save a man from conviction for a particular crime only when it renders him incapable of the state of mind required for that crime. It is admitted in evidence "not in mitigation of punishment, but as tending to show that the less and not the greater offense was in fact committed." *State v. Johnson* (1873) 40 Conn. 136. Heat of passion, on the other hand, reduces the crime because "the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter." *Maher v. People* (1862) 10 Mich. 212, 219, 81 Am. Dec. 781.

¹⁰⁵ An argument can be made that the rule concerning adequate provocation should be liberalized so as to take account of the abnormal irritability and lack of self-control of neurotic and other disordered types, so that a less degree of provocation may be deemed adequate to reduce the offense of such a defendant, than in the case of normal persons. See *post*, p. 103.

may nevertheless be considered in cases where the crime charged involves a specific intent, to determine whether the defendant committed the act with the intent necessary to constitute the crime charged. Thus, if murder in the first degree requires "premeditation" and "deliberation," the defendant's mental disorder should be taken into account in deciding whether those elements were present, or whether the defendant was too disordered to be capable of a premeditated and deliberate killing. If he was so incapable, he cannot be convicted of murder in the first degree, but only of murder in the second degree. This rule seems to have been adopted in some eight or nine states.¹⁰⁶ The rule has been rejected in seven jurisdictions,¹⁰⁷ and three others are doubtful.¹⁰⁸

¹⁰⁶ *Connecticut*: State v. Johnson (1873) 40 Conn. 136; Anderson v. State (1876) 43 Conn. 514; State v. Saxon (1913) 87 Conn. 5, 86 Atl. 590; *Indiana*: Aszman v. State (1889) 123 Ind. 347, 24 N.E. 123; Sage v. State (1883) 91 Ind. 141; Robinson v. State (1887) 113 Ind. 510, 16 N.E. 184; Donahue v. State (1905) 165 Ind. 148, 74 N.E. 996; Hopkins v. State (1913) 180 Ind. 293, 102 N.E. 851; *New Jersey*: State v. Close (1929) 106 N.J.L. 321, 148 Atl. 764; *New York*: People v. Moran (1928) 249 N.Y. 179, 163 N.E. 553 (*dictum*); *Rhode Island*: State v. Fenik (1923) 45 R.I. 309, 121 Atl. 218; *Tennessee*: Davis v. State (1930) 161 Tenn. 23, 28 S.W. (2d) 993; *Utah*: State v. Anselmo (1915) 46 Utah 137, 148 Pac. 1071; State v. Green (1931) 78 Utah 580, 6 Pac. (2d) 177; *Virginia*: Dejarnette v. Comm. (1881) 75 Va. 867; *Wisconsin*: Hempton v. State (1901) 111 Wis. 127, 86 N.W. 596; Oborn v. State (1910) 143 Wis. 249, 126 N.W. 737. See Digest, p. 109 *et seq.*

¹⁰⁷ *Arkansas*: Bell v. State (1915) 120 Ark. 530, 180 S.W. 186; *California*: People v. Troche (1928) 206 Cal. 35, 273 Pac. 767; *District of Columbia*: U.S. v. Lee (1886) 15 D.C. (4 Mackey) 489; *Massachusetts*: Comm. v. Cooper (1914) 219 Mass. 1, 106 N.E. 545; *Missouri*: State v. Holloway (1900) 156 Mo. 222, 56 S.W. 734; State v. Paulsgrove (1907) 203 Mo. 193, 101 S.W. 27; *Pennsylvania*: Comm. v. Hollinger (1899) 190 Pa. 155, 42 Atl. 548; Comm. v. Wireback (1899) 190 Pa. 138, 42 Atl. 542; Comm. v. Szachewicz (1931) 303 Pa. 410, 154 Atl. 483; but see Jones v. Comm. (1874) 75 Pa. 403 and cases cited, p. 139; *Washington*: State v. Schneider (1930) 158 Wash. 504, 291 Pac. 1093. See Digest, p. 109 *et seq.*

¹⁰⁸ *Illinois*: Fisher v. People (1860) 23 Ill. 283; *Kentucky*: Rogers v. Comm. (1894) 96 Ky. 24, 27 S.W. 813; Perciful v. Comm. (1925) 212 Ky.

It is well settled in almost all states that intoxication may be shown for the purpose of proving that the defendant was incapable of the specific criminal intent required,¹⁰⁹ and it is not uncommon for the courts to state the rule regarding intoxication broadly enough to apply to mental disorder as well. Thus, the United States Supreme Court has stated the rule as follows:

When a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such condition of mind, by reason of drunkenness or otherwise, as to be incapable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury.¹¹⁰

The case involved intoxication, and not mental disorder, but it has been cited with approval by the Wisconsin court in an insanity case, in which the court called particular attention to the significant words, "or otherwise," in the rule laid down by the United States Supreme Court.¹¹¹ The courts of several other states have also worded the rule on intoxication broadly enough to apply to all forms of mental unsoundness, however produced,¹¹² but the majority of these have never had occasion actually so to apply it.

Logically, the rule is sound, and is just as applicable in cases of mental unsoundness as in cases of intoxication. As one court

673, 279 S.W. 1062; *Texas*: *Hogue v. State* (1912) 65 Tex. Crim. 539, 146 S.W. 905. See Digest, p. 109 *et seq.*

¹⁰⁹ See *ante*, p. 89.

¹¹⁰ *Hopt v. Utah* (1881) 104 U.S. 631, 26 L. Ed. 873.

¹¹¹ *Hempton v. State* (1901) 111 Wis. 127, 86 N.W. 596.

¹¹² *People v. Belencia* (1863) 21 Cal. 544 (in determining the degree of murder, "any evidence tending to show the mental status of the defendant" held admissible); *People v. Brislane* (1920) 295 Ill. 241, 129 N.E. 185 (if accused at time of the act, "was wholly incapable of forming the intent charged, whether from intoxication or any other causes, he is guilty of no crime"); *Spencer v. State* (1888) 69 Md. 28, 13 Atl. 809 (principle of the *Hopt* case conceded, but held to apply only where there was no evi-

has said, "it would be a legal as well as a logical incongruity to hold that the crime of murder in the first degree could only be committed after deliberate thought or premeditated malice, and yet that it might be committed by one who was without mental capacity to think deliberately or determine rationally."¹¹³ In the practical application of the rule, however, certain difficulties can be suggested.¹¹⁴

Mental Disorder Affecting Provocation. Still another theory which would operate to punish offenders suffering from certain types of minor disorders less severely than normal persons is based upon the rule recognizing heat of passion as a mitigating circumstance in homicide. It is the general rule that heat of passion, induced by provocation sufficient to arouse the passion of a reasonable man, will reduce a homicide from murder to voluntary manslaughter.¹¹⁵ This rule, it has been suggested,

dence of premeditation *aliunde*); *People v. Walker* (1878) 38 Mich. 156 (if defendant, "for any reason whatever," did not indulge the criminal intent, crime cannot have been committed); *State v. Garvey* (1866) 11 Minn. 154 (when intention is an element of the crime, insanity of any kind, or from any cause, rendering the party incapable of forming such intention, is admissible to prove him innocent of that crime); *Wilson v. State* (1897) 60 N.J.L. 171, 37 Atl. 428 (if deliberation and premeditation are essential elements of the crime, "and, by reason of drunkenness or any other cause," the prisoner is incapable of such states of mind, the crime has not been committed); *Pigman v. State* (1846) 14 Ohio 555, 45 Am. Dec. 558 (if the act requires guilty knowledge, or premeditation, it is proper to show "any state or condition of the person that is adverse to the proper exercise of the mind"); *Jones v. Comm.* (1874) 75 Pa. 403 (where self-governing power is wanting, "whether it is caused by insanity, gross intoxication, or other controlling influences," it cannot be said the mind deliberates and premeditates in the sense required for first degree murder); *Pirtle v. State* (1849) 28 Tenn. 663 (where "drunkenness or other cause" excludes premeditation and deliberation, the crime has not been committed).

¹¹³ *Aszman v. State* (1889) 123 Ind. 347, 24 N.E. 123.

¹¹⁴ See p. 413 *et seq.*

¹¹⁵ *Collins v. State* (1912) 102 Ark. 180, 143 S.W. 1075; *Maher v. People* (1862) 10 Mich. 212, 81 Am. Dec. 781; *State v. Kennedy* (1915)

should be liberalized so as to take account of the abnormal irritability of neurotic and other disordered offenders who are not so insane as to be irresponsible. In other words, the adequacy of the provoking circumstances should be judged not merely by an objective standard of reasonableness, but also by the subjective reaction of the individual to those circumstances, so that the same objective irritation which may not be sufficient to provoke a reasonable man may nevertheless be held sufficient in the case of certain psychotic or neurotic individuals.

This theory has been accepted in Tennessee,¹¹⁶ but it has been rejected elsewhere in the United States and in England. Abnormal irritability or temper, caused by mental disease, it is held, will not be considered in determining whether or not the provocation arousing the defendant's passion was adequate, so as to reduce the killing to voluntary manslaughter.¹¹⁷

It has also been held that mental disorder will not be considered in determining whether a sufficient cooling time had elapsed between the provocation and the slaying.¹¹⁸

169 N.C. 288, 84 S.E. 515; *Comm. v. Colandro* (1911) 281 Pa. 343, 126 Atl. 766; and cases cited in 29 Corpus Juris 1131; 13 R.C.L. 785; 134 A.S.R. 732; 7 Brit. Rul. Cases 272.

¹¹⁶ *Davis v. State* (1930) 161 Tenn. 23, 28 S.W. (2d) 993; and see *Maher v. People* (1862) 10 Mich. 212, 81 Am. Dec. 781 (holding that in determining the reasonableness of the provocation, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard, "unless, indeed, the person whose guilt is in question be shown to have some peculiar weakness of mind or infirmity of temper, not arising from wickedness of heart or cruelty of disposition").

¹¹⁷ *Rex v. Lesbini* (1914) 3 K.B. 1116, 84 L.J.K.B. 1102, 112 L.T.N.S. 175, 7 Brit. Rul. Cases 272; *People v. Hurtado* (1883) 63 Cal. 288; *Horton v. U.S.* (1899) 15 App. D.C. 310; *Crews v. State* (1895) 34 Tex. Crim. 532, 31 S.W. 373; *Hurst v. State* (1899) 40 Tex. Crim. 378, 46 S.W. 635, 50 S.W. 719; *Zimmerman v. State* (1919) 85 Tex. Crim. 630, 215 S.W. 101.

¹¹⁸ *Small v. Comm.* (1879) 91 Pa. 304; 134 A.S.R. 733. But see *Terr. v. Bannigan* (1877) 1 Dak. 451; *State v. Hazlett* (1907) 16 N.D. 426, 113

The reason courts have given for refusing to take into consideration abnormal irritability and passion, caused by mental disorder, is that the standard by which the law judges the adequacy of the provocation, is wholly objective. In order to reduce the crime from first degree murder to some lesser offense, the provocation, as has already been said, must be such as to arouse the passion of a reasonable man.¹¹⁹ The peculiar temperament and idiosyncracies of the defendant are not considered.¹²⁰ Thus, ungovernable and uncontrollable temper or excitability,¹²¹ or intoxication,¹²² are not sufficient to render facts adequate as a provocation, which would not be so in the case of an ordinary man. The rule is a concession to the infirmity of human nature, not an excuse for undue or abnormal irascibility.¹²³

Delusions of Adequate Provocation. A somewhat similar argument has been advanced in cases where the defendant is suffering from delusions. Under the rule laid down in M'Naghten's Case, a defendant who committed the act charged while under an insane delusion must be considered in the same situation as if the facts of his delusion were true. Therefore, it has

N.W. 374; *State v. Grugin* (1898) 147 Mo. 39, 47 S.W. 1058, 42 L.R.A. 774, 71 A.S.R. 553; and *Davis v. State* (1931) 161 Tenn. 23, 28 S.W. (2d) 993, holding that sufficiency of the cooling time should not be measured by the ideal reasonable man, but that the "character and temperament" of the defendant should be taken into consideration.

¹¹⁹ See cases cited *ante*, note 115.

¹²⁰ *Garlitz v. State* (1889) 71 Md. 293, 18 Atl. 39, 4 L.R.A. 601; *Freddo v. State* (1912) 127 Tenn. 376, 155 S.W. 170, 44 L.R.A. (N.S.) 659; *Hurst v. State* (1899) 40 Tex. Crim. 378, 46 S.W. 635, 50 S.W. 719; *State v. Gounagias* (1915) 88 Wash. 304, 153 Pac. 9, L.R.A. 1916C 518.

¹²¹ *Comm. v. Eckerd* (1896) 174 Pa. 137, 34 Atl. 305; *Comm. v. Webb* (1915) 252 Pa. 187, 97 Atl. 189.

¹²² *Keenan v. Comm.* (1862) 44 Pa. 55, 84 Am. Dec. 414, 5 L.R.A. (N.S.) 825.

¹²³ *Comm. v. Paese* (1908) 220 Pa. 371, 69 Atl. 891, 17 L.R.A. (N.S.) 793, 13 Ann. Cas. 1081.

been argued, if the facts, if true, would constitute an adequate provocation for a reasonable man, they should equally constitute such provocation for the defendant who insanely believed they were true.

This argument has been advanced only rarely. It was put forward in a Texas case,¹²⁴ in which counsel contended that "where insane delusions enter into a case through the evidence, those delusions are in fact realities with the person affected, and may, if sufficient, constitute adequate cause equally so as if the delusions had a real existence,—that under the law the accused is to be charged upon the same basis as if the insane delusions entertained by him existed in fact."¹²⁵ Therefore, it was insisted, if these delusions, if true, would have required an instruction on manslaughter, then such an instruction should have been given.

The theory was rejected by the court, which pointed out that to reduce a killing to manslaughter required (1) adequate cause, and (2) existing passion. The adequate cause, it was inferred, must be actual, and not the product of the defendant's imagination or disordered mentality.

In a more recent Tennessee case, however, the theory seems to have been accepted.¹²⁶

Evidence of Mental Disorder on Hearing in Mitigation after Plea of Guilty. One situation in which evidence of mental disorder, not sufficient to come within the legal test of irresponsibility, may nevertheless be taken into account as a circumstance in mitigation of punishment, is that of a defendant who pleads guilty and throws himself upon the mercy of the court. Where the court is vested with power to exercise discretion in fixing the punishment upon a conviction or plea of guilty, it may hear evidence and argument both in mitigation and in aggra-

¹²⁴ *Witty v. State* (1914) 75 Tex. Crim. 440, 171 S.W. 229.

¹²⁵ *Ibid.*, p. 454.

¹²⁶ *Davis v. State* (1931) 161 Tenn. 23, 28 S.W. (2d) 993.

vation of sentence.¹²⁷ In some states, statutes make the hearing of such evidence mandatory.¹²⁸

The mitigating circumstances which may be proved on such a hearing "are such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."¹²⁹ "The character of the defendant, his habits, his social standing, his intelligence, his motive for the commission of the offense, are all subjects pertinent to the inquiry required by the statute as to the aggravation or mitigation of the offense."¹³⁰

It seems clear that the fact that the defendant at the time of the act was to a certain degree mentally abnormal, though not so abnormal as to be held irresponsible, is one such circumstance which may be taken into consideration by the court in passing sentence, although it is true that the cases on the point are meager. Since evidence of character and motive is admissible, evidence of mental condition should be admitted in the same connection. Evidence which the prosecution may urge as demonstrating depraved or vicious character, may be rebutted by showing that it can be explained as a product of mental unsoundness, rather than depravity. Similarly the motive with which an act is done, while ordinarily of no importance in determining the offender's responsibility, may nevertheless be considered by the court in fixing the severity of punishment mer-

¹²⁷ *Kistler v. State* (1876) 54 Ind. 400; *Tracey v. State* (1895) 46 Neb. 361, 64 N.W. 1069; *People v. Bork* (1884) 96 N.Y. 188; *State v. Reeder* (1907) 79 S.C. 139, 60 S.E. 434.

¹²⁸ *Arrano v. People* (1897) 24 Colo. 233, 49 Pac. 271; *Smith v. People* (1904) 32 Colo. 251, 75 Pac. 914; *State v. Arnold* (1924) 39 Ida. 589, 229 Pac. 748; *People v. Popescue* (1931) 345 Ill. 142, 177 N.E. 739; *People v. Williams* (1923) 225 Mich. 133, 195 N.W. 818; *Comm. v. Staush* (1917) 256 Pa. 620, 101 Atl. 72; *Garcia v. State* (1922) 91 Tex. Crim. 9, 237 S.W. 279.

¹²⁹ *Smith v. People*, *supra*, quoting *Black's Law Dictionary*.

¹³⁰ *Ibid.*

ited, and the defendant's mental condition may be a factor necessarily to be considered in determining whether the act was prompted by a wicked motive or not. In at least one case, the court has said: "The obvious intent of the statute in fixing the punishment for the crime of robbery at imprisonment from three to fifteen years was to invest the trial court with discretion to grade the punishment—within the limits of the statute—according to the enormity of the offense; to take into consideration in fixing the punishment all the circumstances in evidence under which the crime was committed; perhaps to consider the age, the mental condition and the previous good character of the person convicted."¹⁸¹

The best-known case of the kind is the Loeb-Leopold hearing in Chicago, in 1925, in which eight psychiatrists testified, including some of the most eminent in the country.

In Ohio, an enlightened provision has been incorporated in the recently revised code of criminal procedure, which permits the court to hear testimony in mitigation of sentence, and to direct the probation authorities to make such inquiries and reports as the court may require concerning the defendant, and to appoint "not to exceed two psychologists or psychiatrists who shall make such report or reports concerning the defendant as the court may require for the purpose of determining the disposition of the case."¹⁸² Such use of case histories and psychiatric examinations, as bases for the scientific disposition of defendants, has long been advocated by psychiatrists.

¹⁸¹ *Tracey v. State* (1895) 46 Neb. 361, 64 N.W. 1069.

¹⁸² Ohio Ann. Code (1930), §13451-2.

DIGEST

THE TESTS OF IRRESPONSIBILITY OF THE VARIOUS
JURISDICTIONS IN CASES INVOLVING INSANITY
AS A DEFENSE TO CRIME

UNITED STATES

The Test. Not squarely decided. In *Davis v. U.S.* (1895) 160 U.S. 469, 16 Sup. Ct. 353, the United States Supreme Court approved an instruction that: "The term 'insanity' as used in this defense, means such a perverted and deranged condition of the mental and moral faculties as to render a person unconscious at the time of the nature of the act he is committing; or where, though conscious of the nature of the act and able to distinguish between right and wrong, and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been, otherwise than voluntarily, so completely destroyed that his actions are not subject to it but are beyond his control." The court also quoted with approval the opinion of Shaw, C.J., in *Comm. v. Rogers* (1844) 7 Metc. 500, that to constitute a crime "a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts."

The same instruction quoted above was also approved in *Davis v. U.S.* (1897) 165 U.S. 373, 17 Sup. Ct. 360; *Hotema v. U.S.* (1901) 186 U.S. 413, 22 Sup. Ct. 895; *Matheson v. U.S.* (1912) 227 U.S. 540, 33 Sup. Ct. 355. The Supreme Court has never decided, however, whether it would be reversible error to refuse to give the irresistible impulse test.

ALABAMA

The Test. The tests to be given the jury in every criminal trial where defense of insanity is raised, were stated by Judge Somerville in the famous case of *Parsons v. State* (1886) 81 Ala. 577, 2 So. 854:

"1. Was the defendant, at the time of the commission of the alleged crime, as a matter of fact, afflicted with a disease of the mind,

so as to be either idiotic, or otherwise insane? 2. If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible. 3. If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur: (1) If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed. (2) And if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely."

This test has been uniformly followed in later cases: *Parrish v. State* (1903) 139 Ala. 16, 50, 36 So. 1012; *Porter v. State* (1903) 140 Ala. 87, 37 So. 81; *Granberry v. State* (1913) 182 Ala. 4, 62 So. 52; *Mizell v. State* (1913) 184 Ala. 16, 63 So. 1000; *Lambert v. State* (1922) 207 Ala. 190, 92 So. 265; *Anderson v. State* (1922) 209 Ala. 36, 95 So. 171; *Manning v. State* (1928) 217 Ala. 357, 116 So. 360.

Irresistible Impulse. This is specifically made a defense by the *Parsons Case*, requiring "power to choose." "No one can deny," said Judge Somerville in that case, "that there must be two constituent elements of legal responsibility in the commission of every crime, and no rule can be just and reasonable which fails to recognize either of them: (1) capacity of intellectual discrimination; and (2) freedom of will" (p. 585). "There can not be, and there is not, in any locality or age, a law punishing men for what they can not avoid." This lack of volition, however, Judge Somerville distinguished from moral or emotional insanity "unconnected with disease of the mind," which is not recognized as a defense.

Delusions. The *Parsons Case* tests apply to delusions as to other forms of mental disorder. The rule of *M'Naghten's Case*, that a person afflicted with partial delusion is to be judged as if the facts of the delusion were true, was expressly rejected by Judge Somerville.

ARIZONA

The Test. "Ability to distinguish between right and wrong as applied to the act involved." *Lauterio v. State* (1921) 23 Ariz. 15, 201 Pac. 91.

ARKANSAS

The Test. Knowledge of right and wrong and capacity to choose between them. Insanity is a defense when it appears: (1) that at time of the killing, defendant was under such defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or (2) if he did know it, that he did not know that he was doing what was wrong; or (3) if he knew the nature and quality of the act, and that it was wrong, that he was under such duress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable, because of the disease, to resist the doing of the wrong act which was the result solely of his mental disease. *Bell v. State* (1915) 120 Ark. 530, 180 S.W. 186; *Diggs v. State* (1916) 126 Ark. 455, 190 S.W. 448; *Scruggs v. State* (1917) 131 Ark. 320, 198 S.W. 694; *Hankins v. State* (1917) 133 Ark. 38, 201 S.W. 832; *Kelley v. State* (1920) 146 Ark. 509, 226 S.W. 137; *Travis v. State* (1923) 160 Ark. 215, 254 S.W. 464.

The cases prior to *Bell v. State*, *supra*, were not entirely consistent. In the *Bell Case*, the court tried to reconcile all the precedents by holding that test (1) above (right and wrong test) applied "in every case where the evidence tends to show general insanity or dementia," while tests (2) and (3) above (adding irresistible impulse test) apply "in every case where the evidence tends to prove that the accused, at the time of the alleged criminal act, was afflicted with that disease of the mind termed by medical experts . . . paranoia, which has progressed to the 'stage of persecution.'" Later cases apply these tests, however, even where there is no evidence of paranoia. *Diggs v. State*, *Kelley v. State*, *Travis v. State*, all *supra*.

"Moral" and "emotional" insanity (in which reason is temporarily dethroned by anger, jealousy, or other passion) is no defense, and is distinguished from the irresistible impulse which does excuse crime. *Bell v. State*, *supra*; *Sease v. State* (1922) 155 Ark. 130, 140, 244 S.W. 450.

Delusions. Older cases adopted the mistake of fact test of M'Naghten's Case, that "if a defendant labors under a partial delusion only and is in other respects sane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delu-

sion exists were real." *Bolling v. State* (1891) 54 Ark. 588, 16 S.W. 658; *Smith v. State* (1891) 55 Ark. 259, 18 S.W. 237. But *Bell v. State* and *Hankins v. State*, *supra*, which established the present Arkansas rule, held this mistake of fact test applicable only where paranoia has not reached the second or "persecutory" stage. Where it has, the irresistible impulse test should be added. *Woodall v. State* (1921) 149 Ark. 33, 41, 231 S.W. 186.

Insanity Reducing Grade of Offense. It is error to charge that if defendant, by reason of mental disorder, is incapable of premeditation or deliberation, jury may find him guilty of murder in second degree, or acquit. If defendant's mental condition is not such as to excuse murder in second degree, jury may conclude that it should not excuse murder in first degree either. *Bell v. State*, *supra*.

CALIFORNIA

The Test. Right and wrong test is the sole test of responsibility. But there are at least forty cases, and they have not all stated the test in the same way. Perhaps the majority use a wording similar to that of *M'Naghten's Case*,—that the question is, whether defendant knew the nature and quality of the act, or if he did know it, that he knew he was doing what was wrong. *People v. Coffman* (1864) 24 Cal. 230, 235; *People v. Ferris* (1880) 55 Cal. 588; *People v. Pico* (1882) 62 Cal. 50; *People v. Ashland* (1912) 20 Cal. App. 168, 128 Pac. 798; *People v. Oxnam* (1915) 170 Cal. 211, 149 Pac. 165; *People v. Morisawa* (1919) 180 Cal. 148, 179 Pac. 888; *People v. Williams* (1920) 184 Cal. 590, 194 Pac. 1019; *People v. McGann* (1924) 194 Cal. 688, 230 Pac. 169; *People v. Perry* (1925) 195 Cal. 623, 234 Pac. 890; *People v. Gilberg* (1925) 197 Cal. 306, 240 Pac. 1000; *People v. Keaton* (1931) 211 Cal. 722, 296 Pac. 609. Some cases leave out the element of "nature and quality," and make the test simply capacity to distinguish between right and wrong as to the act charged. *People v. Hoin* (1882) 62 Cal. 120; *Marceau v. Trav. Ins. Co.* (1894) 101 Cal. 338, 35 Pac. 856, 36 Pac. 813; *People v. Fallon* (1906) 149 Cal. 287, 86 Pac. 689; *People v. Clark* (1907) 151 Cal. 200, 90 Pac. 549; *People v. Harris* (1914) 169 Cal. 53, 62, 145 Pac. 520; *People v. Fountain* (1915) 170 Cal. 460, 150 Pac. 341; *People v. Keyes* (1918) 178 Cal. 794, 175 Pac. 6.

Others require "capacity to distinguish between right and wrong in relation to the act charged, and knowledge and consciousness that what he is doing is wrong and criminal, and will subject him to punishment." *People v. Willard* (1907) 150 Cal. 543, 89 Pac. 124; *People v. Bundy* (1914) 168 Cal. 777, 145 Pac. 537; *People v. Reid* (1924) 193 Cal. 491, 225 Pac. 859; *People v. Sloper* (1926) 198 Cal. 238, 244 Pac. 362; *People v. Zari* (1921) 54 Cal. App. 133, 201 Pac. 345.

Irresistible Impulse. Is no defense. *People v. Hoin* (1882) 62 Cal. 120; *People v. Ward* (1894) 105 Cal. 335, 38 Pac. 945; *People v. McCarthy* (1896) 115 Cal. 255, 46 Pac. 1073; *People v. Kernaghan* (1887) 72 Cal. 609, 14 Pac. 566; *People v. Kerrigan* (1887) 73 Cal. 222, 14 Pac. 849; *People v. Hubert* (1897) 119 Cal. 216, 51 Pac. 329; *People v. Barthleman* (1898) 120 Cal. 7, 52 Pac. 112; *People v. Trebilcox* (1906) 149 Cal. 307, 86 Pac. 684; *People v. Owens* (1899) 123 Cal. 482, 56 Pac. 251; *People v. Methever* (1901) 132 Cal. 326, 64 Pac. 481; *People v. Harris* (1914) 169 Cal. 53, 145 Pac. 520; *People v. Morisawa* (1919) 180 Cal. 148, 179 Pac. 888.

Delusions. If defendant had insane delusions but was sane on all other subjects, he must be judged as though facts with respect to which the delusions existed were real, and where these facts do not constitute a defense to the crime, the act cannot be justified on account of insane delusions. *People v. Hubert* (1897) 119 Cal. 216, 51 Pac. 329. But in a later case it was said that the right and wrong test applied in cases of insane delusion. *People v. Willard* (1907) 150 Cal. 543, 89 Pac. 124.

Insanity Reducing Grade of Offense. Insanity cannot be used to reduce crime from first degree to second degree murder. "If responsible at all in this respect, he is responsible in the same degree as a sane man, and if he is not responsible at all he is entitled to an acquittal in both degrees." *People v. Troche* (1928) 206 Cal. 35, 273 Pac. 767.

COLORADO

The Test. Whether defendant had such disease of the mind "as to be incapable of distinguishing right and wrong with respect to the act, or being able to so distinguish . . . such an impairment of mind by disease as to destroy the will power and render him incapable of

choosing the right and refraining from doing the wrong. . . . And this is true howsoever such insanity may be manifested, by insane delusions of whatever nature, by irresistible impulse, or otherwise." *Ryan v. People* (1915) 60 Colo. 425, 433, 153 Pac. 756; *Shank v. People* (1926) 79 Colo. 576, 247 Pac. 559.

Irresistible Impulse. This is a defense, but should not be confused with "moral obliquity, mental depravity, or passion arising from anger, hatred, revenge, and kindred evil conditions, for where the act is induced by any of these causes the perpetrator is accountable to the law." *Ryan v. People, supra*; *Oldham v. People* (1916) 61 Colo. 413, 158 Pac. 148.

Delusions. As specifically stated, test above applies to delusions as to any other form or symptom of mental disease. The test of M'Naghten's Case, that an insane delusion, to constitute a defense to crime, must be of such a character that if things were as the person imagined them to be, it would justify the act springing from such delusion, was held erroneous in *Ryan v. People, supra*, although instructions laying down that rule had been approved in a case just preceding the *Ryan* Case, *Bulger v. People* (1915) 60 Colo. 165, 151 Pac. 937.

CONNECTICUT

The Test. To be punishable, a defendant "must have reason and understanding, enough to enable him to judge of the nature, character and consequences of the act charged against him, that the act is wrong and criminal, and that the commission of it will properly and justly expose him to penalties. He must not be overcome by an irresistible impulse arising from disease." Instructions to this effect were approved in *State v. Johnson* (1873) 40 Conn. 136, and *State v. Saxon* (1913) 87 Conn. 5, 86 Atl. 590.

Intelligence Tests. In an early case, involving a defendant obviously feeble-minded, the trial judge adopted Lord Hale's test, charging the jury that an imbecile is not responsible for crime unless he has intelligence equal to that of ordinary children of fourteen years. *State v. Richards* (1873) 39 Conn. 591. However, in later cases, the court has denied that low mental age is itself a test of responsibility, requiring

an acquittal. *State v. Saxon, supra*; *State v. Wade* (1921) 96 Conn. 238, 251, 113 Atl. 458.

Insanity Reducing Grade of Offense. Insanity not sufficient to render defendant irresponsible may nevertheless be considered by the jury in determining whether it was sufficient to prevent deliberation or premeditation, and so may reduce a homicide to second degree murder. *Anderson v. State* (1876) 43 Conn. 514; *State v. Saxon, supra*.

DELAWARE

The Test. Capacity to distinguish between right and wrong in reference to the particular act, and power to choose whether to do the act or not. *State v. Windsor* (1851) 5 Harr. 512; *State v. Reidell* (1888) 9 Hous. 470, 14 Atl. 550; *State v. Cole* (1899) 18 Del. 344, 45 Atl. 391; *State v. Jack* (1903) 20 Del. 470, 58 Atl. 833.

Irresistible Impulse. Although *State v. Windsor, supra*, had recognized power of will as necessary for responsibility, some subsequent cases have stated the test to be simply ability to distinguish right from wrong. *State v. Danby* (1864) Hous. Crim. Cas. 166; *State v. Pratt* (1867) Hous. Crim. Cas. 249. Neither of these cases expressly denied the correctness of the irresistible impulse test, however, and that test was definitely discussed and approved in *State v. Reidell, supra*. See also *State v. Dillahunt* (1843) 3 Harr. 551; *State v. West* (1873) Hous. Crim. Cas. 371.

DISTRICT OF COLUMBIA

The Test. The accepted rule is that the "accused must be capable, not only of distinguishing between right and wrong, but that he was not impelled to do the act by an irresistible impulse." *Smith v. U.S.* (1929) 59 App. D.C. 144, 36 Fed. (2d) 548. The judge's charge in this case was held erroneous, "in that it ignores the modern well-established doctrine of 'irresistible impulse.'" But it seems the jury need be charged on irresistible impulse only in cases where the facts are sufficient to call for the application of that defense. *Ibid.*

Earlier cases were not clear as to whether irresistible impulse was a defense or not: *U.S. v. Woodward* (1853) 2 Hay. & Haz. Cir. Ct.

Rep. 119 (charge that if defendant had "no will, no conscience, or controlling mental power," he is irresponsible); U.S. *v.* Sickles (1859) 2 Hay. & Haz. Cir. Ct. Rep. 319 (defendant must have "mental power sufficient to apply that knowledge to his own case"); U.S. *v.* Guiteau (1882) 12 D.C. 498, 550 (in absence of evidence of irresistible impulse, no instructions on that subject need be given).

A "mere momentary impulse," in which defendant is sane up to the time of the crime, and sane afterwards, but insane at moment of committing it, "has never received the sanction of the courts of the United States." Snell *v.* U.S. (1900) 16 App. D.C. 501.

Delusions. In Guiteau's Case (1882) 10 Fed. 161, 182, Judge Cox, after quoting mistake of fact test of M'Naghten's Case, told the jury that this test was not deemed entirely satisfactory, and courts have settled down to test of knowledge of right and wrong, "and the question of insane delusions is only important as it throws light upon the question of knowledge of, or capacity to know the right and wrong."

Insanity Reducing Grade of Offense. There is no grade of insanity insufficient to acquit defendant of manslaughter, yet sufficient to acquit him of murder. U.S. *v.* Lee (1886) 15 D.C. (4 Mackey) 489.

FLORIDA

The Test. Is whether defendant "had a sufficient degree of reason to know he was doing an act that was wrong." Davis *v.* State (1902) 44 Fla. 32, 48, 32 So. 822; Cochran *v.* State (1913) 65 Fla. 91, 61 So. 187; Hall *v.* State (1919) 78 Fla. 420, 441, 83 So. 513.

This rule, it is held, is required by the statute providing that the common law of England is of full force in the state, except in so far as changed by statute. Common law rule is laid down in M'Naghten's Case, which is therefore law in Florida. Davis *v.* State, *supra*; Hall *v.* State, *supra*.

Irresistible Impulse. Or "moral insanity," is not recognized. Williams *v.* State (1903) 45 Fla. 128, 138, 34 So. 279, 282; Cochran *v.* State, *supra*; Hall *v.* State, *supra*; Collins *v.* State (1924) 88 Fla. 578, 583, 102 So. 880. "As such a doctrine was not the rule at common law, it is not the rule in this State. We deem it unnecessary to discuss the

merits of the doctrine, if it possesses any. We prefer to leave the matter to legislative action. . . ." *Hall v. State, supra*.

Delusions. Mistake of fact test laid down in M'Naghten's Case is law in Florida, for same reason that right and wrong test is. *Davis v. State, supra*; *Copeland v. State* (1901) 41 Fla. 320, 26 So. 319; *Blocker v. State* (1926) 92 Fla. 878, 893, 110 So. 547.

GEORGIA

The Test. In general, the test is capacity to distinguish between right and wrong as to the particular act. An exception is made, however, in cases of delusional insanity; a defendant is not responsible, even though he knows right from wrong, if, "in consequence of some delusion, the will is overmastered, and there is no criminal intent; provided, that the act itself is connected with the peculiar delusion under which the prisoner is laboring." *Roberts v. State* (1847) 3 Ga. 310; *Choice v. State* (1860) 31 Ga. 424, 475; *Flanagan v. State* (1898) 103 Ga. 619, 625, 30 S.E. 550; *Taylor v. State* (1898) 105 Ga. 738, 746, 31 S.E. 764; *Lee v. State* (1902) 116 Ga. 563, 569, 42 S.E. 759; *Roberts v. State* (1905) 123 Ga. 146, 162, 51 S.E. 374; *Allams v. State* (1905) 123 Ga. 500, 51 S.E. 506; *Glover v. State* (1907) 129 Ga. 717, 722, 59 S.E. 816.

Knowledge of right and wrong is the general test, and the exception regarding delusions need not be given the jury, where there is no evidence of delusional insanity. *Carr v. State* (1895) 96 Ga. 284, 22 S.E. 570; *Glover v. State, supra*; *Holton v. State* (1911) 137 Ga. 86, 72 S.E. 898, 949; *Strickland v. State* (1911) 137 Ga. 115, 72 S.E. 922; *Bowden v. State* (1921) 151 Ga. 336, 106 S.E. 575; *Hinson v. State* (1921) 152 Ga. 243, 109 S.E. 661; *Goosby v. State* (1922) 153 Ga. 496, 112 S.E. 467; *Swain v. State* (1926) 162 Ga. 777, 135 S.E. 187; *Mars v. State* (1926) 163 Ga. 43, 135 S.E. 410; *Caison v. State* (1930) 171 Ga. 1, 154 S.E. 337.

Irresistible Impulse. Irresistible impulse, unless connected with delusions, is no defense. *Anderson v. State* (1871) 42 Ga. 9; *Westmoreland v. State* (1872) 45 Ga. 225; *Fogarty v. State* (1888) 80 Ga. 450, 5 S.E. 782; *Glover v. State, supra*; *Flanagan v. State, supra*. But instructions including the irresistible impulse test were approved in

Clark *v.* State (1928) 167 Ga. 341, 145 S.E. 647, without requiring that the impulse must be the "consequence of some delusion."

IDAHO

The Test. Capacity to know the nature and quality of the particular act, or if he did know it, that he did not know he was doing wrong. People *v.* Walter (1871) 1 Ida. 386; State *v.* Wetter (1905) 11 Ida. 433, 83 Pac. 341.

By "wrong," it was held in State *v.* Wetter, "the law means moral wrong." But in a later case, an instruction was approved which told the jury the test is: "Did he know and understand that it was in violation of the rights of another and in itself wrong? Did he know that it was prohibited by the laws of the state and that its commission would entail punishment and penalty upon himself?" State *v.* Fleming (1910) 17 Ida. 471, 489, 106 Pac. 305.

ILLINOIS

The Test. "Mere ability to distinguish right from wrong is not a correct test . . . where the defense is partial insanity of the type known as paranoia, but the accused must be capable of knowing right from wrong as to the particular act, and he must also be able to exercise the power to choose between them." People *v.* Lowhone (1920) 292 Ill. 32, 126 N.E. 620; People *v.* Geary (1921) 297 Ill. 608, 131 N.E. 97; People *v.* Cochran (1924) 313 Ill. 508, 145 N.E. 207. In later cases, this test was applied as a general test, even where there was no evidence of paranoia. People *v.* Geary (1921) 298 Ill. 236, 131 N.E. 652 (*dictum*); People *v.* Krauser (1925) 315 Ill. 485, 146 N.E. 593; People *v.* Saylor (1925) 319 Ill. 205, 149 N.E. 767. But see People *v.* Marquis (1931) 344 Ill. 261, 176 N.E. 314, mentioning only knowledge of right and wrong as the test, and ignoring irresistible impulse.

Before 1920, the rule was that to require an acquittal, the defendant's unsoundness of mind "must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them." Hopps *v.* People (1863) 31 Ill. 385; Dunn *v.* People (1884) 109 Ill. 635; Dacey *v.* People (1886) 116 Ill. 555, 6 N.E.

165; *Hornish v. People* (1892) 142 Ill. 620, 32 N.E. 677; *Lilly v. People* (1894) 148 Ill. 467, 36 N.E. 95; *Meyer v. People* (1895) 156 Ill. 126, 40 N.E. 490; *O'Shea v. People* (1905) 218 Ill. 352, 75 N.E. 981; *People v. Penman* (1915) 271 Ill. 82, 110 N.E. 894.

Insanity Reducing Grade of Offense. In an early case, it was held that although the defendant's state of mind might not have been such as to excuse a homicide, it may reduce it from murder to manslaughter. *Fisher v. People* (1860) 23 Ill. 283.

INDIANA

The Test. Capacity to distinguish right from wrong and to comprehend nature and consequences of the act, and unimpaired will power strong enough to resist the impulse to commit it. *Bradley v. State* (1869) 31 Ind. 492; *Goodwin v. State* (1884) 96 Ind. 550, 576; *Morgan v. State* (1920) 190 Ind. 411, 130 N.E. 528. It is error to tell jury in one instruction that if defendant could have controlled his will, he is liable; and in another, that if he knew right from wrong, he is liable. Neither knowledge of right and wrong, nor power of will is alone sufficient. Both elements must be present to make defendant responsible. *Morgan v. State, supra.*

Irresistible Impulse. Been consistently held a defense. *Stevens v. State* (1869) 31 Ind. 485; *Bradley v. State, supra*; *Goodwin v. State, supra*; *Walker v. State* (1885) 102 Ind. 502, 1 N.E. 856; *Grubb v. State* (1888) 117 Ind. 277, 20 N.E. 257, 725; *Plake v. State* (1889) 121 Ind. 433, 23 N.E. 273; *Morgan v. State, supra.*

"Moral insanity," or moral depravity, is not insanity, and is distinguished from the irresistible impulse which excuses crime. "The doctrine of moral insanity never did have a place in the law, and is now repudiated by the better authority." *Goodwin v. State, supra.* Nor is mere uncontrollable passion a defense. *Plake v. State, supra.*

Delusions. The mistake of fact test (that a person suffering from insane delusion must be judged as if the facts of the delusion were true) seems to be law in Indiana, but where it does not appear that defendant is of sound mind, except for his delusions, the irresistible impulse test must be added. *McHargue v. State* (1923) 193 Ind. 204, 139 N.E. 316.

Intelligence Tests. "The law does not undertake to measure the

intellectual capacities of men. . . . Mere mental weakness, the subject being of sound mind, is not insanity, and does not constitute a defense to crime." *Wartena v. State* (1886) 105 Ind. 445, 5 N.E. 20. This conception that a defendant, though weak-minded, may still be "of sound mind," is repeated in *Robinson v. State* (1887) 113 Ind. 510, 16 N.E. 184.

Insanity Reducing Grade of Offense. Insanity is not a mitigating circumstance; nevertheless, "independently of any question of insanity the defendant in a criminal cause has the right to have his general physical as well as his mental condition at the time of the commission of the supposed crime explained to the jury, so as to put them in possession of all the facts connected with the transaction, and the better to enable them to judge of its character." *Sage v. State* (1883) 91 Ind. 141. Weakmindedness is no defense, but is "to be considered as bearing upon the intent with which he did the act." *Robinson v. State* (1887) 113 Ind. 510, 16 N.E. 184.

IOWA

The Test. Capacity to comprehend the nature and consequences of the act charged. *State v. Buck* (1928) 205 Ia. 1028, 219 N.W. 17. A long line of prior cases had recognized irresistible impulse as a defense, starting with Judge Dillon's worthy opinion in *State v. Felter* (1868) 25 Ia. 67, 83. In the *Buck Case*, the court tried to reconcile the older cases by suggesting that their statements regarding irresistible impulse were "largely dicta."

Delusions. The M'Naghten Case mistake of fact rule—that a defendant suffering from delusions is to be judged as if the facts in respect to which the delusion exists were real—was held correct in an early case, although the court said it had been "assailed with great force." *State v. Mewherter* (1877) 46 Ia. 88, 100. No later case has directly discussed the question.

KANSAS

The Test. Capacity to know the nature and quality of the particular act, and that it was wrong. *State v. Nixon* (1884) 32 Kans. 205, 211, 4 Pac. 159; *State v. Mowry* (1887) 37 Kans. 369, 375, 15 Pac. 282;

State *v.* O'Neil (1893) 51 Kans. 651, 678, 33 Pac. 287; State *v.* Moore (1908) 77 Kans. 736, 95 Pac. 409; State *v.* Arnold (1909) 79 Kans. 533, 100 Pac. 64; State *v.* Moore (1909) 80 Kans. 232, 238, 102 Pac. 475; State *v.* Murray (1910) 83 Kans. 148, 164, 110 Pac. 103; State *v.* White (1922) 112 Kans. 83, 209 Pac. 660.

Irresistible Impulse. Has been repudiated as a defense. State *v.* Nixon, State *v.* O'Neil, State *v.* Arnold, State *v.* White, all *supra*.

Early cases had seemed favorable to the irresistible impulse defense. State *v.* Reddick (1871) 7 Kans. 143; State *v.* Crawford (1873) 11 Kans. 42; State *v.* Mahn (1881) 24 Kans. 182.

Delusions. There is no separate rule for delusions. The test above is the only test, applicable to all forms and varieties of insanity. State *v.* Arnold, State *v.* White, both *supra*.

KENTUCKY

The Test. Whether defendant had sufficient reason to know right from wrong, and whether he had sufficient will power to govern and control his actions. Graham *v.* Comm. (1855) 55 Ky. 587; Scott *v.* Comm. (1863) 61 Ky. 227; Smith *v.* Comm. (1864) 62 Ky. 224; Kriel *v.* Comm. (1869) 68 Ky. 362; Montgomery *v.* Comm. (1889) 88 Ky. 509, 11 S.W. 475; Abbott *v.* Comm. (1900) 107 Ky. 624, 55 S.W. 196; Arnold *v.* Comm. (1922) 194 Ky. 421, 240 S.W. 87; Thomas *v.* Comm. (1922) 196 Ky. 539, 245 S.W. 164; Southers *v.* Comm. (1925) 209 Ky. 70, 272 S.W. 26; Lindsay *v.* Comm. (1929) 230 Ky. 718, 20 S.W. (2d) 738; Miller *v.* Comm. (1930) 236 Ky. 448, 33 S.W. (2d) 590. If he lacked either element, he is not responsible. Hall *v.* Comm. (1913) 155 Ky. 541, 159 S.W. 1155.

Irresistible Impulse. This was early held a defense, and still is. Scott *v.* Comm., *supra*; Smith *v.* Comm., *supra*; Jolly *v.* Comm. (1901) 110 Ky. 190, 61 S.W. 49. The earlier cases held that "moral insanity" was a defense, but they seemed to use the term as synonymous with irresistible impulse. Later cases hold that moral insanity "coexisting with mental insanity" is no defense. Banks *v.* Comm. (1911) 145 Ky. 800, 141 S.W. 380. Impulse arising from passion, temper, etc., where there is no mental disease, is no defense. Fitzpatrick *v.* Comm. (1883) 81 Ky. 357; McCarty *v.* Comm. (1903) 114 Ky. 620,

71 S.W. 656; *Wright v. Comm.* (1903) 24 Ky. L. Rep. 1838, 72 S.W. 340; *Howard v. Comm.* (1928) 224 Ky. 224, 5 S.W. (2d) 1056; *Hutsell v. Comm.* (1928) 225 Ky. 492, 9 S.W. (2d) 132.

Delusions. There is no special test for delusion. The general test stated above has been applied where the defense was that accused was a paranoiac, suffering from delusions. *Banks v. Comm.*, *supra*.

Mental Weakness. The fact that defendant is feeble-minded is of itself no excuse, if he does not come within the legal test of irresponsibility stated above. *Fitzpatrick v. Comm.* (1883) 81 Ky. 357; *Farris v. Comm.* (1886) 8 Ky. L. Rep. 417, 1 S.W. 729 (affirming conviction of a defendant who, as Court of Appeals itself said, was "in a mental condition bordering almost on idiocy"); *Bast v. Comm.* (1907) 124 Ky. 747, 99 S.W. 978 (affirming ruling of trial court, excluding issue of insanity from jury, though evidence tended to show defendant was epileptic, "of weak mind and easily influenced," and that epilepsy tended to weaken the mind, "as," said the Court of Appeals, "it doubtless did in this case"); *Maulding v. Comm.* (1916) 172 Ky. 370, 189 S.W. 251. See also *Hays v. Comm.* (1896) 17 Ky. L. Rep. 1147, 33 S.W. 1104.

Insanity Reducing Grade of Offense. All attending circumstances,—drunkenness, feeble-mindedness, passion, etc.—were held admissible upon the question of degree of guilt in *Rogers v. Comm.* (1894) 96 Ky. 24, 27 S.W. 813. But in a later case, the court held correct a refusal to give an instruction on manslaughter, saying: "As insanity excuses altogether, it is at once apparent that proof of insanity other than drunkenness would not authorize a manslaughter instruction." *Perciful v. Comm.* (1925) 212 Ky. 673, 279 S.W. 1062. See also *Miller v. Comm.* (1923) 200 Ky. 435, 255 S.W. 96 (defense counsel introduced evidence of insanity not to secure an acquittal, but to send defendant to penitentiary for life; no comment by the court).

LOUISIANA

The Test. "Mental capacity to distinguish between right and wrong." *State v. Tapie* (1931) 173 La. 780, 138 So. 665. The court here words the test in at least five different ways.

Irresistible Impulse. One of the definitions approved in *State v.*

Tapie, *supra*, required capacity to control volition. Another stated that insanity, to be a defense to crime, requires incapacity to distinguish right from wrong, "or such a disordered or distorted condition of the mind as to render the individual incapable of reasoning or of exercising the will." See also *State v. Lyons* (1904) 113 La. 959, 37 So. 890, distinguishing irresistible impulse from "moral insanity," which latter concept "has no support in either psychology or law."

This distinction between irresistible impulse, the result of mental disease, and "moral insanity, coexisting with mental sanity," seems to indicate that the former is a valid defense, though the latter is not.

Earlier cases laid down no definite test. *State v. Dennett* (1867) 19 La. Ann. 395; *State v. Burns* (1873) 25 La. Ann. 302; *State v. Coleman* (1875) 27 La. Ann. 691; *State v. Scott* (1897) 49 La. Ann. 253, 21 So. 271.

MAINE

The Test. Capacity to understand the nature and quality of the act he was doing, and mental power to distinguish between right and wrong with respect to that act, at the time of committing it. *State v. Knight* (1901) 95 Me. 467, 50 Atl. 276.

Irresistible Impulse. Is not accepted as a defense. *State v. Knight, supra*. An earlier case, *State v. Lawrence* (1870) 57 Me. 574, which the court in *Knight* Case purported to follow, had approved a test similar to that stated above, but had definitely left the question of irresistible impulse, as a general test, undecided. An instruction embodying the irresistible impulse test was held correctly refused, on the ground that there was no evidence in the case of such impulse, but the court added that: "It is possible that the increased knowledge of the nature and effects of insanity, may, in appropriate cases, require instructions more in harmony with the requests in this case." The matter was discussed at length in *State v. Knight*, and irresistible impulse rejected as a defense.

MARYLAND

The Test. "Capacity and reason sufficient to enable him to distinguish between right and wrong, and understand the nature and

consequences of his acts, as applied to himself." *Spencer v. State* (1888) 69 Md. 28, 13 Atl. 809; *Deems v. State* (1915) 127 Md. 624, 96 Atl. 878.

Irresistible Impulse. Has been rejected. *Spencer v. State, supra.*

MASSACHUSETTS

The Test. Chief Justice Shaw's charge in *Comm. v. Rogers* (1844) 7 Metc. 500, is still the basis of the Massachusetts rule. Later cases have been content merely to refer to it as decisive of the rule. *Comm. v. Johnson* (1905) 188 Mass. 382, 388, 74 N.E. 939; *Comm. v. Cooper* (1914) 219 Mass. 1, 6, 106 N.E. 545; *Comm. v. Stewart* (1926) 255 Mass. 9, 13, 151 N.E. 74; *Comm. v. Devereaux* (1926) 257 Mass. 391, 398, 153 N.E. 881. But, as has been pointed out (p. 48), Chief Justice Shaw's charge is not very clear, and there is considerable difference of opinion concerning the effect of it.

Irresistible Impulse. The most disagreement has been over whether Chief Justice Shaw's charge allowed irresistible impulse as a defense. While many courts have interpreted the charge to exclude the irresistible impulse test (see p. 48), others have agreed with Professor Keedy's conclusion, that in spite of its confused language and contradictions, "it is highly probable that irresistible impulse unaccompanied by inability to distinguish between right and wrong, or the converse situation, would be held in a concrete case to constitute a defense." Keedy, "Insanity and Criminal Responsibility" (1917), 30 *Harv. Law Rev.* 724, 729. This conclusion is supported by the Massachusetts cases, which have approved instructions that a defendant is not responsible if he "has no will, no conscience, or controlling mental powers." *Comm. v. Johnson, supra.* Or if he "acted from an irresistible and uncontrollable impulse." *Comm. v. Cooper, supra.*

Delusions. In *Comm. v. Rogers, supra*, Chief Justice Shaw held that delusions excuse crime in either of two cases: (1) where "the delusion is such that the person under its influence has a real and firm belief in some fact, not true in itself, but which, if it were true, would excuse his act," as, for example, killing "in supposed self defense"; (2) where the "delusion indicates, to an experienced person, that the mind is in a diseased state . . . so that although there were

no previous indications of violence, yet the subsequent act, connecting itself with the previous symptoms and indications, will enable an experienced person to say that the outbreak was of such a character, that for the time being it must have overborne memory and reason: that the act was the result of the disease and not of a mind capable of choosing; in short, that it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will."

Intelligence Tests. Criminal responsibility does not depend upon mental age of defendant, nor upon whether his mind is above or below that of a normal man. *Comm. v. Stewart, supra*; *Comm. v. Trippi* (1929) 268 Mass. 227, 167 N.E. 354; *Comm. v. Belenski* (1931) 276 Mass. 35, 176 N.E. 501.

Insanity Reducing Grade of Offense. The doctrine that mental defect or abnormality may reduce degree of murder has been rejected. *Comm. v. Cooper* (1914) 219 Mass. 1, 106 N.E. 545.

MICHIGAN

The Test. A defendant is irresponsible if by reason of disease he is "not capable of knowing he was doing wrong in the particular act, or if he had not the power to resist the impulse to do the act by reason of disease or insanity." *People v. Bowen* (1911) 165 Mich. 231, 130 N.W. 706. *Accord:* *People v. Finley* (1878) 38 Mich. 482; *People v. Durfee* (1886) 62 Mich. 487, 29 N.W. 109; *People v. Quimby* (1903) 134 Mich. 625, 96 N.W. 1061.

A defendant charged with larceny must have mind "sufficient to see all the essential ingredients of the offense and acknowledge their existence." *People v. Cummins* (1882) 47 Mich. 334, 11 N.W. 184.

Irresistible Impulse. This is a defense under the test above, but must be the result of disease, "and not the result of his [the defendant's] having allowed his passions to rise until they have become uncontrollable." *People v. Durfee, supra*; *People v. Bowen, supra*.

MINNESOTA

The Test. It is fixed by statute: whether defendant was under such defect of reason "as not to know the nature of his act, or that it was

wrong." Gen. Stat. (1927), §9915. Statute prescribes the only ground upon which defense of insanity is allowed. *State v. Scott* (1889) 41 Minn. 365, 369, 43 N.W. 62; *State v. Williams* (1905) 96 Minn. 351, 360, 105 N.W. 265.

Previous to the enactment of the statute, in 1885, the cases had added another element necessary for responsibility, "mental power sufficient to apply that knowledge to his own case." *State v. Shippey* (1865) 10 Minn. 223; *State v. Gut* (1868) 13 Minn. 341.

Irresistible Impulse. This is rejected as a test, by statutory definition. *State v. Scott, supra.*

MISSISSIPPI

The Test. "Ability, at the time he committed the act, to realize and appreciate the nature and quality thereof—his ability to distinguish right and wrong." *Smith v. State* (1909) 95 Miss. 786, 49 So. 945. This seems to consider the "nature and quality" of the act and the right or wrong of it as synonymous. Previous cases had generally stated the test to be merely whether defendant had capacity to distinguish between right and wrong as to the particular act. *Cunningham v. State* (1879) 56 Miss. 269; *Grissom v. State* (1884) 62 Miss. 167; *Kearney v. State* (1890) 68 Miss. 233, 8 So. 292; *Ford v. State* (1896) 73 Miss. 734, 19 So. 665.

"Wrong" seems to mean moral wrong. *Kearney v. State, supra*; *Smith v. State, supra.*

Irresistible Impulse. Is not a defense except where it renders defendant incapable of distinguishing right from wrong. *Smith v. State* (1909) 95 Miss. 786, 49 So. 945.

Delusions. Right and wrong test applies to delusions, and an instruction adopting doctrine of M'Naghten's Case, "that one who acts from an insane delusion is criminally responsible if the imaginary facts would not, if real, excuse or justify the act," is a material and erroneous modification of the established rule. *Kearney v. State, supra.*

MISSOURI

The Test. Capacity to distinguish between right and wrong of the particular act, at the time of committing it. *State v. Huting* (1855)

21 Mo. 476; State *v.* Redemeier (1879) 71 Mo. 173; State *v.* Erb (1881) 74 Mo. 199; State *v.* Kotovsky (1881) 74 Mo. 247; State *v.* Turlington (1890) 102 Mo. 642, 655, 15 S.W. 141; State *v.* Berry (1903) 179 Mo. 377, 78 S.W. 611; State *v.* Barker (1908) 216 Mo. 532, 115 S.W. 1102; State *v.* Riddle (1912) 245 Mo. 451, 150 S.W. 1044; State *v.* Rose (1917) 271 Mo. 17, 195 S.W. 1013; State *v.* Weagley (1920) 286 Mo. 677, 690, 228 S.W. 817; State *v.* Douglas (1925) 312 Mo. 373, 404, 278 S.W. 1000, 1016.

An early case made the test capacity to know the nature and quality of the act, or, if he did know it, not to know that it was wrong. State *v.* Klinger (1868) 43 Mo. 127. But knowledge of the "nature and quality" of the act need not be added to the right and wrong test. State *v.* Redemeier, *supra*. However, instructions including reference to "nature and quality" of the act are not erroneous. State *v.* Bryant (1887) 93 Mo. 273, 6 S.W. 102.

Irresistible Impulse. This is not a defense. State *v.* Kotovsky, *supra*; State *v.* Pagels (1887) 92 Mo. 300, 317, 4 S.W. 931; State *v.* Williamson (1891) 106 Mo. 162, 17 S.W. 172; State *v.* Miller (1892) 111 Mo. 542, 20 S.W. 243; State *v.* Soper (1899) 148 Mo. 217, 49 S.W. 1007; State *v.* Dunn (1903) 179 Mo. 95, 77 S.W. 848; State *v.* Berry (1903) 179 Mo. 377, 78 S.W. 611; State *v.* Weagley, *supra*. Kleptomania, "a form of disease manifesting itself in an irresistible propensity to steal," is no defense. State *v.* Riddle (1912) 245 Mo. 451, 150 S.W. 1044. In State *v.* Pagels, *supra*, the court said: "It will be a sad day for this state, when uncontrollable impulse shall dictate 'a rule of action' to our courts."

Nevertheless, trial courts have at times dictated just such a rule to juries: Baldwin *v.* State (1848) 12 Mo. 142 (charge that defendant was irresponsible if he was "so irresistibly impelled to the commission of the act, by insane impulse, that he had not the ability to resist that impulse, to control his action and choose between right and wrong," held not legally objectionable); State *v.* Lowe (1887) 93 Mo. 547, 5 S.W. 889 (jury told at least three times that uncontrollable impulse was a defense); State *v.* Miller (1920) 225 S.W. 913 (instruction held "proper" which told jury that if [*inter alia*] defendant "was impelled by an insane impulse, and his powers were so impaired by

disease that he could not refrain from doing the act," he would not be responsible).

Insanity Reducing Grade of Offense. Insanity, not sufficient to require an acquittal, may not be shown to negative deliberation and so reduce crime to murder in second degree. *State v. Holloway* (1900) 150 Mo. 222, 56 S.W. 734; *State v. Paulsgrove* (1907) 203 Mo. 193, 101 S.W. 27.

MONTANA

The Test. Not clear whether there is a legal test, or whether the New Hampshire rule is law, i.e., that there is no test of responsibility except the existence or absence of the necessary criminal intent. The cases seem to approve of the rule stated in *State v. Pike* (1869) 49 N.H. 399 and *State v. Jones* (1871) 50 N.H. 369; yet they approve instructions saying that the test is whether the accused knew the act was wrong, and had capacity to choose to do or not to do it, and to govern his conduct in accordance with such choice. See: *State v. Peel* (1899) 23 Mont. 358, 59 Pac. 169; *State v. Keerl* (1904) 29 Mont. 508, 75 Pac. 362; *State v. McGowan* (1907) 36 Mont. 422, 93 Pac. 552; *State v. Crowe* (1909) 39 Mont. 174, 102 Pac. 579; *State v. Leakey* (1911) 44 Mont. 354, 120 Pac. 234; *State v. Colbert* (1920) 58 Mont. 584, 194 Pac. 145. This confusion is revealed in the opinion of Justice Holloway in *State v. Keerl*, *supra*, stating that "conflicting doctrines on the subject of insanity are announced in *State v. Peel* . . ." and that he cannot "reconcile the doctrine announced in *State v. Pike* . . . and *State v. Jones* . . . which I think correct, and which seems to be approved, with what is said in other portions of the opinion of the majority of the court."

NEBRASKA

The Test. Knowledge of right and wrong is the sole test of responsibility, but the cases do not agree on the wording of the test. Some state it simply as capacity to distinguish right from wrong with respect to, and at the time of, the act complained of. *Wright v. People* (1876) 4 Neb. 407; *Hawe v. State* (1881) 11 Neb. 537, 10 N.W. 452; *Hart v. State* (1883) 14 Neb. 572, 16 N.W. 905; *Anderson v. State* (1889) 25 Neb. 550, 41 N.W. 357; *Davis v. State* (1911) 90 Neb. 361,

133 N.W. 406; Shannon *v.* State (1923) 111 Neb. 457, 463, 196 N.W. 635; Wilson *v.* State (1930) 120 Neb. 468, 233 N.W. 461; Torske *v.* State (1932) 123 Neb. 161, 242 N.W. 408. Some cases state the test to be capacity to understand nature of the act and ability to distinguish between right and wrong with respect to it. Schwartz *v.* State (1902) 65 Neb. 196, 91 N.W. 190; Muzik *v.* State (1916) 99 Neb. 496, 499, 156 N.W. 1056; Philbrick *v.* State (1920) 105 Neb. 120, 179 N.W. 398; Kraus *v.* State (1922) 108 Neb. 331, 187 N.W. 895; Carter *v.* State (1927) 115 Neb. 320, 212 N.W. 614; Sherman *v.* State (1929) 118 Neb. 84, 223 N.W. 645.

It is error to charge that defendant must have been "incapable of understanding the nature of such act and incapable of distinguishing between right and wrong with respect to such act," for this tells the jury to acquit only if both facts existed; i.e., "only in case (1) he was at the time of the fire incapable of understanding the nature of his act, and (2) that he was at the same time incapable of distinguishing between right and wrong with respect to that act." Knights *v.* State (1899) 58 Neb. 225, 78 N.W. 508.

Irresistible Impulse. "The doctrine of moral insanity or uncontrollable impulse . . . is not recognized in the jurisprudence of this state." Schwartz *v.* State (1902) 65 Neb. 196, 91 N.W. 190; Bothwell *v.* State (1904) 71 Neb. 747, 99 N.W. 669. Nevertheless, the court has by some sort of reasoning several times held instructions embodying the irresistible impulse test to be conformable to the rule above. Discussing one such instruction, the court said: "The degree of mental unsoundness, in order to exempt a person from punishment, must be such as to create an uncontrollable impulse to do the act charged. But if it be found to be insufficient to deprive the accused of the ability to distinguish right from wrong, he should be held responsible for the consequences of his act." Wright *v.* People (1876) 4 Neb. 407. See also Hart *v.* State (1883) 14 Neb. 572, 16 N.W. 905; Burgo *v.* State (1889) 26 Neb. 639, 644, 42 N.W. 701; Torske *v.* State, *supra*.

Delusions. Right and wrong test applies to all forms of insanity, "howsoever such insanity is manifested, whether by insane delusions or any other manner." Kraus *v.* State (1922) 108 Neb. 331, 187 N.W. 895. The mistake of fact test, given and approved in Thurman *v.*

State (1891) 32 Neb. 224, 49 N.W. 338, and *Prince v. State* (1912) 92 Neb. 490, 492, 138 N.W. 726, was later repudiated in the *Kraus Case*.

Insanity Reducing Grade of Offense. While the doctrine that mental disorder may be considered in determining the existence of deliberation, premeditation, etc., and so may reduce the grade of an offense, has not been accepted in Nebraska, the Supreme Court has in some cases held feeble-mindedness or mental disorder to be a ground for mitigating punishment, under a statute giving the Supreme Court power to reduce a sentence which it deems excessive. *Hamblin v. State* (1908) 81 Neb. 148, 115 N.W. 850; *Muzik v. State* (1916) 99 Neb. 496, 156 N.W. 1056; *Cryderman v. State* (1917) 101 Neb. 85, 161 N.W. 1045.

NEVADA

The Test. "Capacity and reason sufficient to enable him to distinguish right from wrong as to the particular act in question, and . . . knowledge and consciousness that the act he is doing is wrong and will deserve punishment." *State v. Lewis* (1889) 20 Nev. 333, 350, 22 Pac. 241; *State v. Hartley* (1895) 22 Nev. 342, 40 Pac. 372.

Irresistible Impulse. Is obviously no defense under the test established by *State v. Lewis*. Nevertheless, in *State v. Clancy* (1915) 38 Nev. 181, 147 Pac. 449, the court tacitly approved an instruction that to acquit, the jury must believe that defendant was at the time of the act "without sufficient reason to know what he was doing, or that, as a result of mental unsoundness, he had not sufficient will power to govern his action by reason of some insane impulse which he could not resist or control."

NEW HAMPSHIRE

The Test. There is no legal test possible. When the defense of insanity is set up, the question to be determined is whether, at the time of the act, the defendant had mental capacity to entertain the required criminal intent, and whether he did in fact entertain that intent. This question, and hence also the question of the effect of mental disease upon the existence of this intent, is one of fact for the jury. The court should leave it to the jury in each case to decide:

(1) whether the prisoner had a mental disease; and (2) if he had, whether the disease was of such character or was so far developed, as to take away capacity to form or entertain the criminal intent. *State v. Pike* (1869) 49 N.H. 399; *State v. Jones* (1871) 50 N.H. 369. See p. 79.

NEW JERSEY

The Test. Laid down by Chief Justice Hornblower in 1846: Was the accused, at the time of the act, "conscious that it was an act which he ought not to do?" *State v. Spencer*, 21 N.J.L. 196. This case has been followed in all later decisions, although they do not word the test precisely alike. *Genz v. State* (1896) 59 N.J.L. 488, 37 Atl. 69; *Mackin v. State* (1896) 59 N.J.L. 495, 36 Atl. 1040; *State v. Carrigan* (1919) 93 N.J.L. 268, 108 Atl. 315; *State v. Noel* (1926) 102 N.J.L. 659, 133 Atl. 274; *State v. George* (1932) 108 N.J.L. 508, 158 Atl. 509. Some cases say the question is whether defendant appreciates "the nature and quality of the act and that it is wrong." *Graves v. State* (1883) 45 N.J.L. 347; *State v. Schilling* (1920) 95 N.J.L. 145, 112 Atl. 400; *State v. Close* (1929) 106 N.J.L. 321, 148 Atl. 764.

Knowledge of the wrongfulness of the act refers to wrong "in a moral point of view." *State v. Spencer*, *supra*; *State v. Carrigan*, *supra*.

Irresistible Impulse. Is no defense. *Graves v. State*; *Genz v. State*; *State v. Carrigan*; *Mackin v. State*; *State v. Noel*, all *supra*. The only reason given in earlier cases for rejecting the irresistible impulse test was that the rule established by Chief Justice Hornblower had been accepted so long that it "ought not now to be changed by judicial decision." *Genz v. State*, *supra*. And that it "must be considered as no longer subject to challenge." *State v. Close*, *supra*. This attitude is to be contrasted with that of Judge Somerville, who, in overturning the older cases, said: "The inquiry must not be unduly obstructed by the doctrine of *stare decisis*, for the life of the common law system and the hope of its permanency consist largely in its power of adaptation to new scientific discoveries, and the requirements of an ever advancing civilization. There is inherent in it the vital principle of juridical evolution, which preserves itself by a constant struggle for approximation to the highest practical wisdom. It is not like the

laws of the Medes and Persians, which could not be changed." *Parsons v. State* (1886) 81 Ala. 577, 584, 2 So. 854.

Intelligence Tests. Low mental age is no test of criminal responsibility, and the presumption of innocence of a child under fourteen years does not apply to adults of the mental age of fourteen or less. *State v. Schilling* (1920) 95 N.J.L. 145, 112 Atl. 400.

Insanity Reducing Grade of Offense. The doctrine that mental defect or disease not sufficient to render a defendant irresponsible, may nevertheless operate to reduce the degree of crime, by negating the specific intent, deliberation, premeditation, etc., required for the higher crime, seems to have been accepted as law. *State v. Close* (1929) 106 N.J.L. 321, 148 Atl. 764. A minority of the court had contended for the doctrine in earlier cases. See: *State v. Maioni* (1909) 78 N.J.L. 339, 74 Atl. 526; *State v. Schilling* (1920) 95 N.J.L. 145, 112 Atl. 400; *State v. James* (1921) 96 N.J.L. 132, 114 Atl. 553; *State v. Martin* (1925) 102 N.J.L. 388, 132 Atl. 93; *State v. Noel* (1926) 102 N.J.L. 659, 133 Atl. 274.

NEW MEXICO

The Test. Irresistible impulse seems to be a defense, as well as incapacity to distinguish right from wrong, but this is not clear. In *Faulkner v. Terr.* (1892) 6 N. Mex. 464, 30 Pac. 905, the right and wrong test alone is mentioned, but in *Terr. v. Kennedy* (1910) 15 N. Mex. 556, 110 Pac. 854, the court seems to hold that insanity which deprives the will of its governing powers is a defense.

NEW YORK

The Test. Established by statute as "such a defect of reason as: (1) not to know the nature and quality of the act he was doing, or (2) not to know that the act was wrong." Cahill's Consol. Laws (1923), chap. 41, §1120. This is "the only test of responsibility known to the law of the State of New York." *People v. Carlin* (1909) 194 N.Y. 448, 455, 87 N.E. 805; *People v. Silverman* (1905) 181 N.Y. 235, 73 N.E. 980.

The courts had adopted this test even before the statute was passed. *People v. Kleim* (1845) Edm. Sel. Cas. 13; *Freeman v. People* (1847)

4 Denio 9; *People v. Devine* (1848) Edm. Sel. Cas. 594; *People v. Pine* (1848) 2 Barb. 566; *Willis v. People* (1865) 32 N.Y. 715; *O'Brien v. People* (1867) 36 N.Y. 276; *Cole's Trial* (1868) 7 Abb. Prac. 321.

"Wrong," as used in the statute, means moral, as distinguished from legal, wrong. *People v. Schmidt* (1915) 216 N.Y. 324, 110 N.E. 945.

"Defect of reason" as used in the statute means disease of the mind, and defendant cannot be excused on ground of insanity "unless at the time of the commission of the act, he was suffering from disease of the mind." *People v. Carlin, supra*.

Irresistible Impulse. Is no defense. *Flanagan v. People* (1873) 52 N.Y. 467; *People v. Coleman* (1881) 1 N.Y. Crim. 1; *Walker v. People* (1882) 88 N.Y. 81; *People v. Carpenter* (1886) 102 N.Y. 238, 6 N.E. 584. Not only is irresistible impulse excluded as a test by the statute above, but another section further provides that "a morbid propensity to commit crime" in a person not incapable of knowing the wrongfulness of the act, is no defense. *Cahill's Consol. Laws* (1930), chap. 41, §34.

Delusions. In spite of the oft-repeated statement that the statutory right and wrong test is "the only test known to the law of New York," a separate test has sometimes been given regarding delusions, namely, the "mistake of fact" test, that such delusion is no excuse "unless it is of such a character, that if it had been true, it would have rendered the homicide excusable or justifiable." This was said by the Court of Appeals in *People v. Taylor* (1893) 138 N.Y. 398, 34 N.E. 275, although the court there purported to follow the statutory test. The same is true of *People v. Ferraro* (1900) 161 N.Y. 365, 55 N.E. 931. But in *People v. Schmidt, supra*, it was expressly held that the statutory test applied to cases of delusion, and the mistake of fact test was not mentioned. Since *People v. Schmidt* is a later and a much-cited case, it may be that the rule stated in *People v. Taylor* and *People v. Ferraro* has been overruled.

Insanity Reducing Grade of Offense. "Feebleness of mind or will, even though not so extreme as to justify a finding that the defendant is irresponsible, may properly be considered by the triers of the facts in determining whether a homicide has been committed with a de-

liberate and premeditated design to kill, and may thus be effective to reduce the grade of the offense." *People v. Moran* (1928) 249 N.Y. 179, 163 N.E. 553 (*dictum*).

NORTH CAROLINA

The Test. "If the prisoner at the time of the homicidal act was in a state of mind to comprehend his relation to others, the nature and criminal character of the act, and was conscious that he was doing wrong, he was responsible; otherwise he was not. . . ." *State v. Potts* (1888) 100 N.C. 457, 6 S.E. 657; *State v. English* (1913) 164 N.C. 497, 80 S.E. 72. *Accord:* *State v. Haywood* (1867) 61 N.C. 376; *State v. Jones* (1926) 191 N.C. 753, 133 S.E. 81.

An instruction making the test knowledge of right and wrong, without referring to the "nature and character" of the act, has been disapproved. *State v. Spivey* (1903) 132 N.C. 989, 43 S.E. 475.

Irresistible Impulse. Has been rejected as a defense. *State v. Brandon* (1862) 53 N.C. 463; *State v. Potts, supra*; *State v. Cooper* (1915) 170 N.C. 719, 87 S.E. 50; *State v. Terry* (1917) 173 N.C. 761, 92 S.E. 154. "To know the right and still the wrong pursue," said the court in *State v. Brandon, supra*, "proceeds from a perverse will brought about by the seductions of the evil one. . . . If the prisoner knew that what he did was wrong, the law presumes that he had the power to resist it, against all supernatural agencies, and holds him amenable to punishment." This naïve conception of volitional and inhibitory defects as manifestations of "the seductions of the evil one" has been held up to ridicule by numerous commentators, but the North Carolina court has not wavered in its faith, but has repeated these words in later cases, even as late as the Cooper and Terry cases. Still, the court does not seem wholly clear in its theology, for it has also approved and commended instructions which spoke of insanity as a "visitation of God." *State v. Haywood, supra*; *State v. Journegan* (1923) 185 N.C. 700, 117 S.E. 27.

NORTH DAKOTA

The Test. Is established by statute, providing that lunatics, insane, etc., are incapable of crime "upon proof that at the time of commit-

ting the act charged against them they were incapable of knowing its wrongfulness." Comp. Laws (1913), §9207. This is a "somewhat drastic statutory provision under which an insane person may be punished for a criminal act, if at the time of its commission, the proof shows that he knew the same was wrongful." *State v. Barry* (1903) 11 N.D. 428, 452, 92 N.W. 809. In spite of the fact that the only test given by the statute is knowledge of the wrongfulness of the act, the court in *State v. Thronson* (1922) 49 N.D. 348, 191 N.W. 628, said: "The generally accepted test of responsibility for crime is the capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act." "Capacity to understand the nature of the act" is not mentioned in the statute.

OHIO

The Test. Was the accused a free agent in forming the purpose to kill? Was he, at the time the act was committed, capable of judging whether that act was right or wrong? And did he know at the time that it was an offense against the laws of God and man? *Clark v. State* (1843) 12 Ohio R. 483, 495; *Blackburn v. State* (1872) 23 Ohio St. 146; *State v. Miller* (1895) 7 Ohio N.P. 458.

Irresistible Impulse. The requirement that defendant must be a "free agent" to be responsible makes irresistible impulse a defense. *Blackburn v. State, supra.* Accord: *Farrer v. State* (1853) 2 Ohio St. 54. As early as 1834, a jury was told that to be responsible, the defendant must have had "power to forbear or to do the act." *State v. Thompson* (1834) Wright's Ohio Rep. 617, 622.

Irresistible impulse, arising from mental derangement, is distinguished from "moral insanity, supposing this latter term to be a supposed insanity of the moral system, co-existing with mental sanity. Moral insanity, as thus defined, has no legal recognition." *State v. Adin* (1876) 1 Ohio W. Bull. 38.

Insanity Reducing Grade of Offense. In *Cottell v. State* (1896) 12 O. Cir. Ct. 467, the trial court had granted an instruction that "partial insanity, or an intellect so weak as to leave the accused without the power to deliberate and premeditate was sufficient to reduce the

grade of the offense to murder in the second degree—a much less degree of insanity would excuse these elements of murder in the first degree than would excuse from the entire criminal act.” The circuit court seems tacitly to have approved this; it reversed the case on another ground, but added that there was “no other error found in the record.”

OKLAHOMA

The Test. Established by statute, providing that lunatics, insane, etc., are incapable of committing crime, “upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness.” Okla. Stat. (1931), §1797. Although the statute speaks only of capacity to know the wrongfulness of the act, the court has held that capacity to understand the nature and consequences of the act is embraced in the test of moral wrongfulness. *Mias v. Terr.* (1901) 10 Okla. 714, 63 Pac. 960. Under the statute, responsibility is fixed at the point where the accused has mental capacity to distinguish between right and wrong as to the particular act, and to understand the nature and consequences of such act. *Queenan v. Terr.* (1901) 11 Okla. 261, 71 Pac. 218; *Alberty v. State* (1914) 10 Okla. Crim. 616, 140 Pac. 1025; *Smith v. State* (1916) 12 Okla. Crim. 307, 155 Pac. 699; *Owen v. State* (1917) 13 Okla. Crim. 195, 163 Pac. 548; *Roe v. State* (1920) 17 Okla. Crim. 587, 191 Pac. 1048; *McNeill v. State* (1920) 18 Okla. Crim. 1, 192 Pac. 256; *Agent v. State* (1920) 18 Okla. Crim. 281, 194 Pac. 233; *Ussaery v. State* (1923) 22 Okla. Crim. 397, 404, 212 Pac. 137; *Reed v. State* (1923) 23 Okla. Crim. 56, 212 Pac. 441.

But see *Adair v. State* (1911) 6 Okla. Crim. 284, 294, 118 Pac. 416, holding that “even if the accused at the time of committing the act charged against him was capable of knowing its wrongfulness, he is not criminally responsible, if by reason of his insanity he did not have the will and mental power to refrain from committing such act.” The doctrine of this case seems to be deliberately misquoted in later cases. *Alberty v. State*, *supra*; *Roe v. State*, *supra*. Yet the *Adair* Case was followed in one later case, *Claycomb v. State* (1923) 22 Okla. Crim. 315, 211 Pac. 429.

Irresistible Impulse. Is no defense. *Snodgrass v. State* (1918) 15

Okla. Crim. 117, 175 Pac. 129; *Sloan v. State* (1923) 25 Okla. Crim. 15, 218 Pac. 717; *Tittle v. State* (1929) 44 Okla. Crim. 287, 280 Pac. 865.

OREGON

The Test. Knowledge of right and wrong. The cases have not all worded it alike. The earliest made it "capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he did; . . . knowledge and consciousness that it was wrong and criminal and would subject him to punishment." *State v. Murray* (1884) 11 Ore. 413, 5 Pac. 55; *State v. Zorn* (1892) 22 Ore. 591, 30 Pac. 317. A later case said: "Insanity, to excuse crime, must be such as dethrones reason and renders the subject incapable of discerning right from wrong, or of understanding or appreciating the extent, nature, consequences or effect of his wrongful act." *State v. Lauth* (1905) 46 Ore. 342, 80 Pac. 660. A more recent case merely says the test is "power to discriminate between right and wrong." *State v. Butchek* (1927) 121 Ore. 141, 253 Pac. 367, 254 Pac. 805.

Irresistible Impulse. Has been expressly repudiated. *State v. Grayson* (1928) 126 Ore. 560, 270 Pac. 404. Statute provides that "a morbid propensity to commit prohibited acts," where the person knows the wrongfulness of such acts, is no defense. Code (1930) §14-1042. This statute establishes a "conclusive presumption" that a person with sufficient mental capacity to know an act is unlawful and wrong is capable of governing his conduct accordingly, and of resisting any impulse to violate the law. *State v. Hassing* (1911) 60 Ore. 81, 118 Pac. 195. Nevertheless, the court has found "no error" in instructions which required "power to do or to refrain from doing the act," to render defendant responsible. *State v. Branton* (1899) 33 Ore. 533, 549, 56 Pac. 267.

PENNSYLVANIA

The Test. Not clear. The leading exposition of the Pennsylvania law is still Chief Justice Gibson's charge in *Comm. v. Mosler* (1846) 4 Pa. 264. See *ante*, p. 49. A complete list of cases follows: *Comm. v. Farkin* (1844) 2 Pars. Sel. Eq. Cas. 439; *Comm. v. Mosler*, *supra*; *Comm. v. Freeth* (1858) 6 Am. L. Reg. 400; *Ortwein v. Comm.* (1874) 76 Pa. 414; *Sayres v. Comm.* (1879) 88 Pa. 291; *Nevling v.*

Comm. (1881) 98 Pa. 322; Coyle v. Comm. (1882) 100 Pa. 573; Taylor v. Comm. (1885) 109 Pa. 262, 271; Comm. v. Hillman (1899) 189 Pa. 548, 42 Atl. 196; Comm. v. Wireback (1899) 190 Pa. 138, 42 Atl. 542; Comm. v. Lewis (1908) 222 Pa. 302, 71 Atl. 18; Comm. v. Hallowell (1909) 223 Pa. 494, 72 Atl. 845; Comm. v. DeMarzo (1909) 223 Pa. 573, 72 Atl. 893; Comm. v. Snyder (1909) 224 Pa. 526, 73 Atl. 910; Comm. v. Pacito (1911) 229 Pa. 328, 78 Atl. 828; Comm. v. Calhoun (1913) 238 Pa. 474, 86 Atl. 472; Comm. v. Cavalier (1925) 284 Pa. 311, 131 Atl. 229; Comm. v. Schroeder (1931) 302 Pa. 1, 152 Atl. 835; Comm. v. Szachewicz (1931) 303 Pa. 410, 154 Atl. 483.

Irresistible Impulse. The doubtful question is whether irresistible impulse is a defense. That incapacity to distinguish right from wrong is a defense is clear. But in cases where the evidence shows some "lack of control because of mental disease," or a mind "dominated by an irresistible impulse," it has been said: "The power to distinguish between right and wrong is not always the only test of responsibility, since this power may exist without the power of self control." Comm. v. DeMarzo, *supra*. But where there is no such evidence, it is proper for the court to refuse an instruction on irresistible impulse. Comm. v. Hillman, *supra*. However, in Comm. v. Cavalier (1925) 284 Pa. 311, 320, 131 Atl. 229, the court said: "If there has been any departure from the wise rule which makes the test of the accused's responsibility his ability to distinguish between right and wrong, it has been surrounded at all times with the restriction imposed by Chief Justice Gibson," quoting C.J. Gibson's statement that the doctrine is dangerous, and requires "clear proofs." And in Comm. v. Schroeder (1931) 302 Pa. 1, 152 Atl. 835, the court said that "the defense of irresistible impulse is one which our law does not recognize."

Insanity Reducing Grade of Offense. Insanity is a complete defense, if it comes within the legal test; otherwise it is no justification or mitigation of crime, and will not serve to reduce the degree of the offense. Comm. v. Hollinger (1899) 190 Pa. 155, 42 Atl. 548. See also: Comm. v. Wireback (1899) 190 Pa. 138, 152, 42 Atl. 542; Comm. v. Heidler (1899) 191 Pa. 375, 43 Atl. 211. Nevertheless, in a number of

cases, the court has approved, at least by implication, instructions that if the self-governing power was wanting, by reason of intoxication or insanity, the defendant cannot be said to have deliberated or premeditated in the sense required for first degree murder. *Nevling v. Comm.* (1881) 98 Pa. 322; *Comm. v. Werling* (1894) 164 Pa. 559, 30 Atl. 406; *Comm. v. Hillman* (1899) 189 Pa. 548, 42 Atl. 196. And see *Comm. v. Sherer* (1920) 266 Pa. 210, 109 Atl. 867; *Jones v. Comm.* (1874) 75 Pa. 403.

RHODE ISLAND

The Test. No cases. The right and wrong test was given by the trial court in one case, but the Supreme Court expressly refused to pass upon the definition of insanity, as a question not involved in the case. *State v. Quigley* (1904) 26 R.I. 263, 270, 58 Atl. 905, 67 L.R.A. 322, 3 Ann. Cas. 920.

Insanity Reducing Grade of Offense. Evidence that defendant was not in his normal state, though not an excuse for homicide, "is relevant on the question of the fixity and duration of the conscious intent or premeditation." *State v. Fenik* (1923) 45 R.I. 309, 121 Atl. 218.

SOUTH CAROLINA

The Test. "Mental capacity or the want of it sufficiently to distinguish moral or legal right from moral or legal wrong, and to recognize the particular act charged as morally or legally wrong." *State v. Jackson* (1910) 87 S.C. 407, 69 S.E. 883; *State v. Bramlett* (1920) 114 S.C. 389, 397, 103 S.E. 755. The most cited case is *State v. Bundy* (1885) 24 S.C. 439, where the Supreme Court approved an instruction that to be relieved from responsibility, defendant must show "that he was under a mental delusion by reason of mental disease, and that at the time of the act he did not know that the act he committed was wrong, or criminal, either the one or the other. Because, notwithstanding his mind may be diseased, if he is still capable of forming a correct judgment as to the nature of the act, as to its being morally or legally wrong, he is still responsible for his act and punishable as if no mental disease existed at all." The rule thus established has been followed in subsequent cases. *State v. Alexander*

(1888) 30 S.C. 74, 8 S.E. 440; *State v. McIntosh* (1893) 39 S.C. 97, 17 S.E. 446; *State v. Lloyd* (1909) 85 S.C. 73, 67 S.E. 9; *State v. Hyde* (1911) 90 S.C. 296, 73 S.E. 180.

Irresistible Impulse. Is no excuse. *State v. Alexander, supra*; *State v. Levelle* (1891) 34 S.C. 120, 131, 13 S.E. 319; *State v. Lloyd, supra*. "While it is not to be denied that there are cases in some of the States which recognize this doctrine as a defense against a charge of crime, yet it never has, and we trust never will, obtain a foothold in this State." *State v. Levelle, supra*, quoting the statement of the Missouri court that "it will be a sad day for this State when uncontrollable impulse shall dictate a rule of action to our courts."

SOUTH DAKOTA

The Test. "Capacity to know the wrongfulness of the act charged is the test of responsibility adopted by our criminal code." *State v. Leechman* (1891) 2 S.D. 171, 49 N.W. 3. The code provision is that all persons are capable of committing crime except (among others) lunatics, insane, etc., "upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness." *Comp. Laws* (1929), vol. i, §3583.

TENNESSEE

The Test. Capacity to distinguish between right and wrong, and consciousness that the act is wrong and will subject him to punishment. *Stuart v. State* (1873) 60 Tenn. 178; *Johnson v. State* (1898) 100 Tenn. 254, 260, 45 S.W. 436; *Bond v. State* (1914) 129 Tenn. 75, 83, 165 S.W. 229; *Watson v. State* (1915) 133 Tenn. 198, 180 S.W. 168; *Davis v. State* (1930) 161 Tenn. 23, 28 S.W. (2d) 993. "The question is always whether the accused, at the time he committed the act, knew its nature and character, and that it was wrong." *Wilcox v. State* (1894) 94 Tenn. 106, 28 S.W. 312.

The earliest cases made the test "capacity to distinguish between good and evil, and consciousness that the act is wrong." *Dove v. State* (1872) 50 Tenn. 348, 370; *Firby v. State* (1874) 62 Tenn. 358.

"Wrong," it seems, means legal wrong. *Watson v. State, supra*; *McElroy v. State* (1922) 146 Tenn. 442, 242 S.W. 883.

Irresistible Impulse. "The idea that an irresistible impulse is an ex-

cuse for the commission of crime, where the party is capable of knowing right from wrong, has no foundation in our jurisprudence." *Wilcox v. State, supra*; *Davis v. State, supra*. Earlier cases had seemed to indicate that in a proper case, irresistible impulse might be a defense. *Henslie v. State* (1871) 50 Tenn. 202; *Stuart v. State, supra*; *Hunt v. State* (1877) 2 Shannon 395.

Insanity Reducing Grade of Offense. The mind of one laboring under insane delusion is incapable of reason and reflection necessary to the existence of malice, without which murder may not exist. *Davis v. State* (1930) 161 Tenn. 23, 28 S.W. (2d) 993.

TEXAS

The Test. Capacity to distinguish right from wrong as to the particular act. The cases are too numerous to mention. A few follow: *Carter v. State* (1854) 12 Tex. 500; *Webb v. State* (1879) 5 Tex. App. 596; *Leache v. State* (1886) 22 Tex. App. 279, 3 S.W. 539; *Harrison v. State* (1902) 44 Tex. Crim. 164, 69 S.W. 500; *Kelley v. State* (1907) 51 Tex. Crim. 151, 101 S.W. 230; *Maxey v. State* (1912) 66 Tex. Crim. 234, 145 S.W. 952; *Parker v. State* (1922) 91 Tex. Crim. 68, 238 S.W. 943; *Craven v. State* (1923) 93 Tex. Crim. 328, 247 S.W. 515; *Newman v. State* (1924) 99 Tex. Crim. 363, 269 S.W. 440; *Alexander v. State* (1928) 8 S.W. (2d) 176.

Not all the cases word the test alike. Some adopt the wording of M'Naghten's Case—"such defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know that he was doing wrong," but the Texas cases add, ". . . that is, that he did not know the difference between the right and the wrong as to the particular act charged against him." *Webb v. State, supra*; *Leache v. State, supra*; *Clark v. State* (1880) 8 Tex. Crim. App. 350; *Smith v. State* (1886) 22 Tex. Crim. App. 317; *Hurst v. State* (1899) 40 Tex. Crim. 378, 46 S.W. 635, 50 S.W. 719; *Nugent v. State* (1904) 46 Tex. Crim. 67, 80 S.W. 84; *Thomas v. State* (1909) 55 Tex. Crim. 293, 116 S.W. 600; *Smith v. State* (1909) 55 Tex. Crim. 563, 117 S.W. 966; *Tubb v. State* (1909) 55 Tex. Crim. 606, 117 S.W. 858; *Roberts v. State* (1912) 67 Tex. Crim. 580, 150 S.W. 627; *Rogers v. State* (1913) 71 Tex. Crim. 149, 159 S.W. 40.

The Texas court seems to consider "nature and quality of the act" synonymous with "knowledge of right and wrong" regarding it. Thus, it is correct merely to charge that to be excused, defendant must not have known the nature and quality of the act. *Montgomery v. State* (1912) 68 Tex. Crim. 78, 151 S.W. 813. On the other hand, an instruction merely saying that knowledge of right and wrong is the test, without mentioning knowledge of the nature and quality of the act, is also correct. *Lester v. State* (1913) 69 Tex. Crim. 426, 154 S.W. 554.

Irresistible Impulse. The earlier Texas cases allowed irresistible impulse as a defense. Instructions emphasizing need of "freedom of moral action," "will," etc., were approved in *King v. State* (1880) 9 Tex. App. 515; *Warren v. State* (1880) 9 Tex. App. 619. Kleptomania was held a defense in *Looney v. State* (1881) 10 Tex. App. 520; and *Harr's v. State* (1885) 18 Tex. App. 287. But later cases hold that irresistible impulse is no defense. *Cannon v. State* (1900) 41 Tex. Crim. 467, 56 S.W. 351; *Lowe v. State* (1902) 44 Tex. Crim. 224, 70 S.W. 206; *Thomas v. State* (1909) 55 Tex. Crim. 293, 116 S.W. 600; *Roberts v. State* (1912) 67 Tex. Crim. 580, 150 S.W. 627; *Kirby v. State* (1912) 68 Tex. Crim. 63, 150 S.W. 455; *Mikeska v. State* (1916) 79 Tex. Crim. 109, 182 S.W. 1127; *Craven v. State* (1923) 93 Tex. Crim. 328, 247 S.W. 515; *Langhorn v. State* (1926) 105 Tex. Crim. 470, 289 S.W. 57. Nevertheless, cases can be found where this test is included in the charge to the jury, and in *Witty v. State* (1914) 75 Tex. Crim. 440, 171 S.W. 229, such a charge, setting forth the irresistible impulse test at great length, was approved by the Court of Criminal Appeals as "a most admirable presentation of the law." Similar instructions were approved in *Sartin v. State* (1907) 51 Tex. Crim. 571, 103 S.W. 875; *Calloway v. State* (1922) 92 Tex. Crim. 506, 244 S.W. 549; and *Newman v. State* (1924) 99 Tex. Crim. 363, 269 S.W. 440. And in *Zimmerman v. State* (1919) 85 Tex. Crim. 630, 639, 215 S.W. 101, the court itself said that the rule is that defendant must prove "that he did not know the nature and quality of the act; that it was an act that he ought not to do; or that if he knew it was wrong, that he had not sufficient will-power to refrain from doing the same." In *Kirby v. State* (1912) 68 Tex. Crim. 63, 150 S.W. 455, the court again said the

test was "knowledge of right from wrong of the particular act and the ability to refrain therefrom."

Delusions. "We gather from the authorities that a delusion need not be confined, as was formerly held, to the delusive belief of a fact which, if true, would afford a justification. But if the delusion was of such a character as to impair the mind of the person possessed thereof, to such an extent that the person was not able to discern the right or wrong of the particular act he was doing, and was induced to commit the particular act by the delusion, he would not be a criminal." *Merritt v. State* (1898) 39 Tex. Crim. 70, 45 S.W. 21. Accord: *Tubb v. State* (1909) 55 Tex. Crim. 606, 117 S.W. 858.

Feeble-mindedness. Mere weak-mindedness is no defense, if defendant knew right from wrong as to the act. *Nelson v. State* (1902) 43 Tex. Crim. 553, 67 S.W. 320; *Craven v. State* (1923) 93 Tex. Crim. 328, 247 S.W. 515; *McKenny v. State* (1926) 105 Tex. Crim. 353, 288 S.W. 465.

Insanity Reducing Grade of Offense. "This court has never recognized the doctrine that a person with a mind below normal should be punished for a lower grade of offense if found guilty than a person of normal mind. . . . Evidence may be introduced for the purpose of showing defendant's state of mind, as establishing his intent and fixing the grade of the offense, but if a person has sufficient intelligence to know right from wrong he is legally responsible for his acts." *Hogue v. State* (1912) 65 Tex. Crim. 539, 146 S.W. 905. Though far from clear, this language seems to accept the rule that insanity may be shown to negative criminal intent. That defendant, by reason of insanity, was highly excitable, does not prove adequate provocation, which must be such as to rouse the passion of a reasonable man. *Crews v. State* (1895) 34 Tex. Crim. 532, 31 S.W. 373; *Hurst v. State* (1899) 40 Tex. Crim. 378, 46 S.W. 635, 50 S.W. 719; *Witty v. State* (1914) 75 Tex. Crim. 440, 171 S.W. 229; *Zimmerman v. State* (1919) 85 Tex. Crim. 630, 637, 215 S.W. 101.

UTAH

The Test. A person is entitled to an acquittal if at the time of the act he was so insane as either (1) not to know the nature of the act,

or (2) not to know that it was wrong in the sense that it was condemned by morals or law, or (3) not to be able to control his impulses to commit it. *State v. Green* (1931) 78 Utah 580, 6 Pac. (2d) 177. Earlier cases referred only to the right and wrong test. *People v. Calton* (1888) 5 Utah 451, 16 Pac. 902; *State v. Mewhinney* (1913) 43 Utah 135, 134 Pac. 632; *State v. Hadley* (1925) 65 Utah 109, 234 Pac. 940.

Irresistible Impulse. "Volitional ability to choose the right and avoid the wrong is as fundamental in the required guilty intent of one accused of crime as is the intellectual power to discern right from wrong and understand the nature and quality of his acts." *State v. Green, supra*.

Delusions. A person acting under insane delusion is not responsible, where the facts existing in his imagination would, if actually true, justify or excuse the act. *State v. Green, supra*.

Insanity Reducing Grade of Offense. Where a particular intent is a necessary element in a higher degree of crime, mental disease may have the effect of reducing the degree of the crime. *State v. Anselmo* (1915) 46 Utah 137, 148 Pac. 1071; *State v. Green, supra*.

VERMONT

The Test. "If one's mental and moral faculties are so disordered and deranged that he cannot distinguish between right and wrong, or is not conscious at the time of the nature of the act he is committing, or if conscious of it and able to distinguish between right and wrong, yet if his mind or will is, involuntarily, so completely destroyed that he cannot control his actions, he is in a legal sense insane and is not subject to punishment for criminal acts committed when in such a state." *Doherty v. State* (1901) 73 Vt. 380, 50 Atl. 1113. *Accord:* *State v. Kelsie* (1919) 93 Vt. 450, 108 Atl. 391. A charge wording the test in the conjunctive, that defendant is not liable if he did not know the act was wrong and had no power to choose and govern his actions, is error, since it requires both elements to justify acquittal, when legally one (incapacity to know right from wrong) is enough. *State v. Kelley* (1902) 74 Vt. 278, 52 Atl. 434. But see *Rogers v. State* (1905) 77 Vt. 454, 487, 61 Atl. 489, where it is said that incapacity to distinguish right from wrong is not enough, but

the mind must be overcome by an insane impulse. This case is probably not law.

Intelligence Tests. Low intelligence or imbecility is not of itself sufficient to relieve from responsibility. The same test applies as in other cases of insanity. *Rogers v. State, supra*. Rule relieving children under fourteen does not apply to adults of that mental age. *State v. Kelsie, supra*.

VIRGINIA

The Test. Knowledge of nature and consequences of the act, and that it is wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and "withal a will sufficient to restrain the impulse that may arise from a diseased mind." Instructions wording the test in this way have been approved in *Dejarnette v. Comm.* (1881) 75 Va. 867; *Thurman v. Comm.* (1908) 107 Va. 912, 60 S.E. 99. While approving the instructions given, the court in *Dejarnette's Case* said that "it is not possible, in the nature of things, that the court can lay down any abstract rules with which to measure the minds of men, or to determine the extent of their criminal responsibility."

Insanity Reducing Grade of Offense. In *Dejarnette v. Comm., supra*, defendant asked instructions that defendant's mental condition should be considered in weighing evidence of malice, deliberation, and premeditation, and that if defendant, by a predisposition to insanity, was not in a frame of mind to deliberate and premeditate, the killing would not be murder. The court held these requests "vague and ambiguous" and properly refused, but added: "At the same time, there are, doubtless, cases in which, whilst the prisoner may not be insane, in the sense which exempts from punishment, yet he may be in that condition from partial aberration or enfeeblement of intellect which renders him incapable of the sedate, deliberate and specific intent necessary to constitute murder in the first degree."

WASHINGTON

The Test. "Capacity at the time of committing the act to distinguish between right and wrong with reference to the act complained of." *State v. Craig* (1909) 52 Wash. 66, 100 Pac. 167; *State v. Saffron*

(1927) 143 Wash. 34, 254 Pac. 463; *State v. Schafer* (1930) 156 Wash. 240, 286 Pac. 833.

Irresistible Impulse. "The legal problem must resolve itself into the inquiry whether there was mental capacity or moral freedom to do or abstain from doing the particular act." *State v. Schafer, supra.*

Insanity Reducing Grade of Offense. There is no degree of mental irresponsibility which would render a defendant incapable of premeditated murder, and so reduce the crime to murder in the second degree. *State v. Schneider* (1930) 158 Wash. 504, 291 Pac. 1093.

WEST VIRGINIA

The Test. Knowledge of right and wrong as to the particular act. *State v. Harrison* (1892) 36 W. Va. 729, 743, 15 S.E. 982; *State v. Maier* (1892) 36 W. Va. 757, 770, 15 S.E. 991; *State v. Cook* (1911) 69 W. Va. 717, 72 S.E. 1025; *State v. Evans* (1923) 94 W. Va. 47, 53, 117 S.E. 885. The only case where the court actually formulated the rule is *State v. Harrison*, where the test was said to be: "Capacity to know right from wrong, and comprehend his relations to others, and to understand the nature and consequence of the particular act, and that the act was morally wrong, or what is the same, whether he was conscious of doing wrong."

Irresistible Impulse. "Will not exempt." *State v. Harrison, supra;* *State v. Cook, supra.*

WISCONSIN

The Test. "Such an abnormal mental condition produced by any cause as renders him at the time of doing that act unable to distinguish between right and wrong in respect to that act." *Jessner v. State* (1930) 202 Wis. 184, 231 N.W. 634. "Such a perverted condition of the mental and moral faculties as to render the person incapable of distinguishing between right and wrong." *Oehler v. State* (1930) 202 Wis. 530, 232 N.W. 866. Such abnormal mental condition as renders defendant "incapable of distinguishing between right and wrong and so unconscious at the time of the nature of the act which he is committing, and that commission of it will subject him to punishment." *Oborn v. State* (1910) 143 Wis. 249, 126 N.W. 737.

Irresistible Impulse. The earlier cases seemed to approve of irresistible impulse as a defense. *Bennett v. State* (1883) 57 Wis. 69, 14 N.W. 912; *Butler v. State* (1899) 102 Wis. 364, 78 N.W. 590; *Lowe v. State* (1903) 118 Wis. 641, 96 N.W. 417. But in *Oborn v. State, supra*, it was said that none of these cases had squarely approved the irresistible impulse doctrine, and that "the law does not recognize a form of insanity in which the capacity of distinguishing right from wrong exists without the power of choosing between them."

Insanity Reducing Grade of Offense. "The same rule that permits proof of intoxication as bearing on the question of malice, permits evidence of a disordered mental condition, however produced." *Hempton v. State* (1901) 111 Wis. 127, 86 N.W. 596. Although a person who knows right from wrong must exercise self-control, and cannot escape responsibility altogether, yet "his condition may affect the grade of the offense." *Oborn v. State, supra*, p. 272.

WYOMING

The Test. Knowledge of the nature and probable consequences of his act, and that it was morally wrong and forbidden by law, and sufficient power of will to control his acts. *Flanders v. State* (1916) 24 Wyo. 81, 156 Pac. 1121; *Cirej v. State* (1916) 24 Wyo. 507, 161 Pac. 556.

Irresistible Impulse. Is a defense, but is to be distinguished from emotional insanity, a mere frenzy or ungovernable passion, growing out of hatred, anger, etc. *Flanders v. State, supra*.

CHAPTER IV

THE BURDEN OF PROOF

§1. SUMMARY OF PRESENT AMERICAN RULES

By "burden of proof," as the term is here used, is meant the risk of non-persuasion, i.e., that the jury, if not sufficiently satisfied of the truth of a given proposition, should return a verdict against the party required to convince of the truth or falsity of that proposition.

The Law Summarized. The first question is as to the actual state of the law in the various jurisdictions—whether the defendant bears the risk of establishing that he is so disordered mentally as to be irresponsible for his criminal acts, or whether the prosecution has the burden of proving responsibility.¹ Upon this question there are two distinct views, the first of which appears in at least three variations according to the quantum of evidence required:

1. The defendant must prove his lack of responsibility at the time of the offense:

- a. Beyond reasonable doubt.
- b. To the satisfaction of the jury.
- c. By a preponderance of the evidence.

2. The prosecution must prove, beyond a reasonable doubt, that the defendant, at the time of the commission of the offense, was sufficiently sane to be held criminally responsible.

Rule Regarding Burden of Proof Adopted in Each State. Twenty-two American states follow the first rule, that irresponsibility arising from insanity is an affirmative defense, which the defendant has the burden of proving; but they differ widely as to the quantum of evidence which must be produced to satisfy that burden.

¹ What degree of mental unsoundness is required to render a person irresponsible for crime has been discussed in chapters ii and iii.

That the defendant must establish his irresponsibility "beyond a reasonable doubt" was held in some of the earlier American cases,² but has now been abandoned everywhere except in Oregon, where the rule is established by statute.³

That the defendant must prove this defense "to the satisfaction of the jury" is the law in four states.⁴ A slight deviation from this rule is followed in Alabama, where by statute the defense of insanity must be "clearly proved to the reasonable satisfaction of the jury."⁵

Twelve states hold that the defendant must prove his irresponsibility "by a preponderance of the evidence."⁶

In Missouri and New Jersey, the courts word the rule as requiring this defense to be proved "by a preponderance of the evidence" and "to the satisfaction of the jury."⁷

² *State v. Spencer* (1846) 21 N.J.L. 196; *Sellick's Case* (1816) 1 City Hall Rec. (N.Y.) 185; *People v. Sprague* (1849) 2 Park. Crim. Rep. (N.Y.) 43; *State v. Pratt* (1867) Houston Crim. Cas. (Del.) 249; and cases cited in 39 L.R.A. 737.

³ Ore. Code (1930), §13-922; *State v. Butchek* (1927) 121 Ore. 141, 253 Pac. 367, 254 Pac. 805; *State v. Grayson* (1928) 126 Ore. 560, 270 Pac. 404; and cases cited, p. 191.

⁴ Delaware, North Carolina, Virginia, West Virginia. For cases, see Digest, p. 172 *et seq.*

⁵ Ala. Code (1928), §4572; *Manning v. State* (1928) 217 Ala. 357, 116 So. 360; and cases cited, p. 172.

⁶ Arkansas, California, Iowa, Louisiana, Maine, Montana, Nevada, Ohio, Pennsylvania, Rhode Island, Texas, Washington. For cases, see Digest, p. 172 *et seq.*

⁷ *State v. Klinger* (1868) 43 Mo. 127 (defense of insanity must be proved to reasonable satisfaction of the jury, by the weight and preponderance of the evidence); *State v. Douglas* (1925) 312 Mo. 373, 406, 278 S.W. 1016 ("sufficient if the jury was reasonably satisfied, by the weight and preponderance of the evidence"); *Genz v. State* (1896) 58 N.J.L. 482, 34 Atl. 816 (insanity "must be proved to the satisfaction of the jury, and it may be established by the preponderance of proof"); *State v. Overton* (1913) 85 N.J.L. 287, 88 Atl. 689 ("preponderance of proof and evidence satisfactory to the jury"); *State v. Kudzinowski* (1929) 106 N.J.L. 155, 147 Atl. 453 ("a clear preponderance of proof and by the most satisfactory evidence"). See also other cases cited in Digest,

The Minnesota Supreme Court has held that the defendant has the burden of proving the defense of insanity, but has never stated what degree of proof is required.⁸

In Kentucky, both "the preponderance of the evidence" and "the satisfaction of the jury" have been disapproved as terms phrasing the rule, and the court has held that the correct rule is that if the jury "believe" that the defendant was so insane as to come within the legal test of insanity, they should acquit.⁹

The second rule, that the prosecution must prove that the accused at the time of the act charged was sane enough to be held responsible, has been adopted in twenty states (and perhaps two more, the rule in Georgia and South Carolina not being clear), as well as in the federal courts and in the District of Columbia.¹⁰

Between the rule requiring the defendant to prove by a preponderance of evidence that he was not responsible at the time

p. 172 *et seq.* Iowa at one time also held that this defense must be proved "by a preponderance of evidence or (which is the same) satisfactory evidence." *State v. Felter* (1871) 32 Ia. 49, 54. This case is still cited as authority, but the cases now state the rule as requiring simply a preponderance of evidence. *State v. Brandenberger* (1911) 151 Ia. 197, 130 N.W. 1065. See also *State v. Fugate* (1927) 103 W. Va. 653, 138 S.E. 318.

⁸ *Bonfanti v. State* (1858) 2 Minn. 123; *State v. Hanley* (1886) 34 Minn. 430, 26 N.W. 397; and cases cited, p. 185. See *State v. Grear* (1882) 29 Minn. 221, 13 N.W. 140 (approving instruction that insanity must be proved "by a fair preponderance of the evidence").

⁹ For cases, see *Digest*, p. 182. But the later cases do not seem to bear this rule in mind. In the two most recent cases, the Kentucky court said in one that insanity must be shown "by a preponderance of the evidence" (*Feree v. Comm.* [1922] 193 Ky. 347, 236 S.W. 246) and in the other, that it must be "satisfactorily" shown (*Arnold v. Comm.* [1922] 194 Ky. 421, 240 S.W. 87).

¹⁰ United States Supreme Court, Arizona, Colorado, Connecticut, District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, New Mexico, New York, Oklahoma, Tennessee, Utah, Wisconsin, Wyoming. For cases, see *Digest*, p. 172 *et seq.*

For Georgia and South Carolina rule, see *post*, p. 159.

of the act charged, and the rule requiring the prosecution to prove beyond a reasonable doubt that the defendant was responsible, there might seem to be room for still another possible rule, namely, that the state must prove responsibility, but only by a preponderance of the evidence. This rule was supported by the New York cases for a short time,¹¹ but is nowhere law to-day. The statement sometimes made, that this view is "held by a few courts," is erroneous.¹²

In four states, the problem of burden of proof in cases where insanity is set up as a defense to crime has never been passed upon by the courts, and no statutes determine the matter.¹³

§2. RULE THAT BURDEN OF PROOF IS ON DEFENDANT

Historical Development. As has just been pointed out, twenty-two states hold that the defendant has the burden of proving that he was insane and irresponsible at the time of the alleged crime, but these states do not agree as to the quantum of evidence which the defendant must produce, one state, Oregon, requiring him to prove his irresponsibility beyond reasonable doubt, others requiring satisfactory proof, and still others, a mere preponderance of the evidence. The explanation of this difference is historical. The earlier cases, English and American, looked upon the defense of insanity with some suspicion, and in order that it might not be abused, held that for a defendant to be acquitted on that ground, his irresponsibility must be "clearly" proved. The rule was so stated in the Opinion of the Judges in M'Naghten's Case,¹⁴ the most famous decision on the subject of insanity in our law, and "clear" or "clearly"

¹¹ *People v. Nino* (1896) 149 N.Y. 317, 328, 43 N.E. 853; *People v. Barberi* (1896) 47 N.Y. Supp. 168.

¹² The New York cases supporting this rule have long been overruled. *People v. Egnor* (1903) 175 N.Y. 419, 427, 67 N.E. 906.

¹³ Maryland, North Dakota, South Dakota, Vermont.

¹⁴ (1843) 10 Clark & Fin., 200. See *ante*, p. 27, Answers II and III.

is given as the measure of proof in most of the early American cases.¹⁵

But "clearly" is an ambiguous word. It may mean either beyond reasonable doubt, or some lesser degree of proof. The use of this term has confused many courts. Thus, in the early cases which held that the defense of insanity must be proved beyond reasonable doubt, the courts usually cited in support of their decision cases which held that the defense must be "clearly" proved, arguing, with much reason, that an issue cannot be said to have been clearly proved so long as a reasonable doubt remains.¹⁶

¹⁵ *Choice v. State* (1860) 31 Ga. 424; *Newcomb v. State* (1859) 37 Miss. 383, 2 Morris St. Cas. 1303; *People v. Kleim* (1845) 1 Edm. Sel. Cas. (N.Y.) 13; *Clark v. State* (1843) 12 Ohio Rep. 483; *Comm. v. Mosler* (1846) 4 Pa. 264; *Carter v. State* (1854) 12 Tex. 500.

¹⁶ The Louisiana cases illustrate the confusion which the use of the word "clearly" has caused. The early Louisiana cases had held that the defense of insanity must be "clearly" proved, "to the satisfaction of the jury." *State v. Burns* (1873) 25 La. Ann. 302; *State v. Coleman* (1875) 27 La. Ann. 691. In *State v. DeRance* (1882) 34 La. Ann. 186, the court cited and professed to follow *State v. Coleman*, but held that this defense must be proved beyond reasonable doubt, for, said the court, "that which leaves a reasonable doubt in the mind cannot be said to be *clearly* proved. A mind vexed with reasonable doubts about a fact cannot be satisfied as to the existence of such fact."

The *DeRance* case was followed in *State v. Clements* (1895) 47 La. Ann. 1088, 17 So. 502, but was later overruled. *State v. Scott* (1897) 49 La. Ann. 253, 21 So. 271. In this case, the court returned to the older rule that the defendant must prove his irresponsibility "clearly" but held that he should not be required to prove it beyond a reasonable doubt, indicating that the court here felt that "clear" proof was not equivalent to proof beyond a reasonable doubt. The more recent Louisiana cases drop the use of the word "clearly" entirely, and require lack of responsibility to be proved by a preponderance of the evidence. *State v. Johnson* (1907) 118 La. 276, 42 So. 935; *State v. Surrency* (1921) 148 La. 983, 88 So. 240.

Similar confusion appears in a New Jersey decision, *Graves v. State* (1883) 45 N.J.L. 203. In 1846, Chief Justice Hornblower had held that the defendant must prove his defense of insanity beyond reasonable doubt. *State v. Spencer* (1846) 21 N.J.L. 196. In *Graves v. State*, the

But the great majority of courts were unwilling to go so far as to require the defense of insanity to be proved beyond reasonable doubt, and many of them, agreeing that the term "clearly" was equivalent to "beyond reasonable doubt," held that the former was also incorrect, and that instructions telling the jury that this defense must be "clearly" proved were erroneous.¹⁷ In some other states, the use of the word "clearly" has never been expressly repudiated, but the courts of last resort have tacitly dropped the use of it in phrasing the rule. At present, there is no court of last resort which words the rule as requiring the defendant to prove his insanity "clearly" (except in Alabama, where the rule is not judicial, but statutory). However, a few of the courts which now word the rule as requiring only a preponderance of the evidence to establish the defense of insanity, have nevertheless tried to reconcile the older cases in which "clear" proof was required, and have held that instructions telling the jury that insanity must be "clearly" proved are not erroneous.¹⁸ However, even these courts, though holding that the

Spencer case is cited, the trial court saying that for fifty years, the New Jersey rule had been "clear and certain," that the defendant must prove this defense "by a clear preponderance of proof." The Court of Errors and Appeals affirmed the case, and said this defense must be proved "to the satisfaction of the jury, and it must be established by the preponderance of proof; in other words, it must be sustained by the evidence." Thus, within one case, every possible rule concerning the quantum of evidence which the defendant must produce is approved, evidently under the assumption that they all amount to the same thing.

¹⁷ *People v. Wreden* (1881) 59 Cal. 392; *People v. Wells* (1904) 145 Cal. 138, 78 Pac. 470; *State v. Hundley* (1870) 46 Mo. 414; *Coyle v. Comm.* (1882) 100 Pa. 573; *Comm. v. Molten* (1911) 230 Pa. 399, 79 Atl. 638.

¹⁸ In Iowa, it has been held no error to instruct the jury that they are not required to find the accused insane unless the evidence "clearly establishes such fact." *State v. Novak* (1899) 109 Ia. 717, 79 N.W. 465. But more recently, the Iowa court has said that it is better to omit such qualifying words as "clearly establish." *State v. Wegener* (1917) 180 Ia. 102, 162 N.W. 1040. And while the *Novak* case has never been overruled,

use of the term "clearly" is not erroneous, no longer use that term when they themselves state the rule.

A number of other terms besides "clear" and "clearly" have also been disapproved as requiring too high a measure of proof. That the evidence must be "conclusive" has been held erroneous,

the court has shown no inclination to follow it. See *State v. Brandenberger* (1911) 151 Ia. 197, 209, 130 N.W. 1065.

In Texas, where a preponderance of the evidence is now held sufficient to establish the defense of insanity, the Court of Criminal Appeals has nevertheless refused to hold erroneous, instructions requiring this defense to be "clearly proved." But the court has tried to restrict the use of such instructions by adding that "where the charge uses the expression 'clearly proved' this should be qualified by an instruction to the effect that this does not mean that it must be established beyond a reasonable doubt, but merely by a preponderance of the testimony." *Hurst v. State* (1899) 41 Tex. Crim. 378, 388, 46 S.W. 635, 50 S.W. 719; *Stanfield v. State* (1906) 50 Tex. Crim. 69, 94 S.W. 1057. But this restriction does not seem to be insisted upon; the court has approved charges requiring "clear" proof, where no such explanation was given. *Nugent v. State* (1904) 46 Tex. Crim. 67, 80 S.W. 84. And as late as 1919, the court has said that "many cases have been approved by this court in which the charge instructed the jury that such defense must be clearly made out." *Hartman v. State*, 85 Tex. Crim. 582, 213 S.W. 936.

In Pennsylvania, although in general, insanity may be proved by a fair preponderance of the evidence, irresistible impulse must be clearly proved, to constitute a defense (if it constitutes a defense at all, a doubtful question; see p. 138). Instructions requiring clearly preponderating evidence have been held erroneous, where irresistible impulse was not involved. *Coyle v. Comm.* (1882) 100 Pa. 573; *Comm. v. Molten* (1911) 230 Pa. 399, 79 Atl. 638. But as to irresistible impulse, or "homicidal mania," the court still repeats the statement of Chief Justice Gibson in *Comm. v. Mosler* (1846) 4 Pa. 264, that this is a defense dangerous to acknowledge, and when relied upon, its contemporaneous existence, or the existence of a habitual tendency, must be shown by clear proof. *Comm. v. Calhoun* (1913) 238 Pa. 474, 86 Atl. 472; *Comm. v. Cavalier* (1925) 284 Pa. 311, 321, 131 Atl. 229. Chief Justice Gibson's opinion in the *Mosler* case was one of the earliest to recognize irresistible impulse as a defense at all, so the guarded language there used was quite natural. But today, there is no other state recognizing irresistible impulse as a defense in which any distinction is made between that and any other form of mental disorder, as to the quantum of evidence required.

and is supported by no modern cases.¹⁹ So also, instructions have been held error which said that a preponderance of the evidence meant "evidence which proves to a moral certainty."²⁰ Instructions requiring proof "to a moral certainty" were formerly approved in Georgia,²¹ but have been held error in later cases.²² It has also been held error to charge that the "*most* satisfactory" proof is required (where the rule is that the proof must be "satisfactory" to the jury),²³ or that the jury must be "*fully* satisfied"²⁴ (where "all that is required is proof which is satisfactory, such as flows fairly from a preponderance of the evidence"). Where a preponderance of evidence is all that is required, instructions that insanity must be "satisfactorily" established have been disapproved,²⁵ and in one state are held to constitute reversible error.²⁶

Reasons for Putting Burden of Proof on Defendant. The courts which hold that the defendant has the burden of establishing his irresponsibility base their decisions upon (1) legalistic theory, and (2) considerations of policy. The theory is that sanity is the natural condition of men, and that therefore the law presumes all men to be sane until the contrary is proved; insanity is therefore an affirmative defense, which the defendant

¹⁹ *State v. Brandenberger* (1911) 151 Ia. 197, 130 N.W. 1065; *Pannell v. Comm.* (1878) 86 Pa. 260.

²⁰ *People v. Miller* (1916) 171 Cal. 649, 154 Pac. 468.

²¹ *Minder v. State* (1901) 113 Ga. 772, 39 S.E. 284; *Bowden v. State* (1921) 151 Ga. 336, 106 S.E. 575.

²² *Polk v. State* (1918) 148 Ga. 34, 95 S.E. 988; *Currie v. State* (1922) 153 Ga. 178, 111 S.E. 727; *Goosby v. State* (1922) 153 Ga. 496, 112 S.E. 467.

²³ *Mahon v. State* (1897) 20 N.J.L.J. 146. But see *State v. Kudzinowski* (1929) 166 N.J.L. 155, 147 Atl. 453, where such wording was held no error.

²⁴ *Comm. v. Lee* (1910) 226 Pa. 283, 75 Atl. 411.

²⁵ *People v. Messersmith* (1882) 61 Cal. 246; *People v. Hamilton* (1882) 62 Cal. 377.

²⁶ *State v. Hauser* (1920) 101 Ohio St. 404, 131 N.E. 66.

must establish. But there seems to be no legal principle which requires that this presumption of sanity must prevail until the contrary is established. Usually, presumptions hold only until they may fairly be said to have been challenged by contrary evidence. The reason for requiring the defendant to do more than merely produce challenging evidence seems to be the second one, public policy. The courts which have given any reason except the legalistic argument for putting the burden on the defendant, usually say that insanity is easily feigned, and "mere doubtful evidence of insanity would fill the land with acquitted criminals."²⁷ Whether this fear is still justified, in the light of the present state of psychiatric knowledge, may be questioned,²⁸ and as a proposition of law, the argument has been rejected by the United States Supreme Court.²⁹

Statutes Placing Burden of Proof on Defendant. In some states, the burden of convincing the jury of his irresponsibility is placed on the defendant by statute. In Alabama, a statute which has been in effect since 1889 provides that the defendant

²⁷ *Ortwein v. Comm.* (1874) 76 Pa. 414, 425; *accord*: *State v. Klinger* (1868) 43 Mo. 127; *Boswell v. Comm.* (1871) 20 Grat. (Va.) 860; *State v. Clark* (1904) 34 Wash. 485, 76 Pac. 98.

²⁸ Given the opportunity for adequate observation and examination, psychiatrists can detect malingering in most instances. Meagher, "Malingering in Criminals; Its Forensic Psychiatric Significance" (1928), 45 *Medico-Legal Jour.* 78; C. K. Mills, "Simulated Insanity" (1909), 53 *Jour. Am. Med. Ass'n* 1373.

²⁹ "It seems to us that undue stress is placed in some of the cases upon the fact that, in prosecutions for murder the defense of insanity is frequently resorted to and is sustained by the evidence of ingenious experts whose theories are difficult to be met and overcome. Thus, it is said, crimes of the most atrocious character often go unpunished, and the public safety is thereby endangered. But the possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the courts to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice." *Davis v. U.S.* (1895) 160 U.S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499.

must prove his defense of insanity "clearly . . . to the reasonable satisfaction of the jury."³⁰ A Montana statute requires the accused to prove this defense "by a preponderance of the testimony."³¹ In Delaware and Minnesota, also, statutes seem to require the accused to assume the burden of proving his irresponsibility, but the courts, while following the same rule, have never referred to the statutes.³² The Oregon statute, requiring the accused to establish his irresponsibility "beyond a reasonable doubt," has already been mentioned.

The courts of a number of states have sometimes said that the very common statutory provision, that if the jury acquits a defendant on the ground of insanity, the jury shall so state in its verdict, etc., "by implication at least," puts the burden of proof on the defendant.³³ As one of these courts has said:

It can hardly be supposed that the legislature expected or intended that the jury should return as a fact the insanity of the prisoner when they have only a reasonable doubt of his sanity, or that he should be detained in custody till restored to his right mind, where there is not sufficient proof to make even a *prima facie* case that he is otherwise than sane.³⁴

³⁰ Ala. Code (1928), §4572.

³¹ Mont. Laws (1925), chap. 87. Before 1925, the Montana courts had followed the rule that the defendant need only raise a reasonable doubt of his mental responsibility, whereupon the state had the ultimate burden of proving responsibility. *State v. Colbert* (1920) 58 Mont. 584, 593, 194 Pac. 145.

³² "If . . . the defense of insanity shall be made and established *to the satisfaction of the jury* . . . it shall be the duty of the jury to return a verdict of 'not guilty by reason of insanity.'" Del. Rev. Code (1915), §2606. "Every person is presumed to be responsible for his acts, and the burden of rebutting such presumption is upon him." Minn. Stat. (1927), §9913.

³³ *State v. Lawrence* (1870) 57 Me. 574; *Comm. v. Eddy* (1856) 73 Mass. 583; *Bonfanti v. State* (1858) 2 Minn. 123; *Ortwein v. Comm.* (1874) 76 Pa. 414, 423; *State v. Quigley* (1904) 26 R.I. 263, 58 Atl. 905.

³⁴ *State v. Lawrence, supra*.

However, such provisions are found in almost every state in the union; their purpose is to provide a procedure for the safe-keeping of defendants who are acquitted of crime on the ground of insanity, and the great majority of courts have never intimated that such a provision is to be construed as establishing a rule on the subject of the burden of proof. Even in those cases where it has been so construed, the statute has been relied on only secondarily, as an additional argument for holding that the burden is on the defendant.

§3. RULE THAT BURDEN OF PROOF IS ON THE STATE

Historical Development. The courts of nineteen states, the federal courts, and the Court of Appeals of the District of Columbia, have repudiated the doctrine that insanity is an affirmative defense which the accused must establish. These courts hold, on the contrary, that since a sound mind is essential to criminal responsibility, the prosecution must prove beyond a reasonable doubt that the accused was mentally capable of the criminal intent required to constitute the crime charged, as it must prove any other material fact. Of course, until the issue of sanity is raised by evidence, the presumption that all persons are sane relieves the prosecution from introducing evidence on the subject. This is sometimes called the American rule, since it constitutes a departure on the part of those American courts which have adopted it from the older English rule, which places the burden on the defendant.

This American rule is first found in the reported cases just before the Civil War. The first judicial opinion in which it was set forth seems to have been that of Judge Brown in *People v. McCann*, decided by the New York Court of Appeals in 1857.³⁵ The following year a Massachusetts case adopted what seems to be the same view.³⁶ The first court squarely to adopt this rule,

³⁵ 16 N.Y. 58.

³⁶ *Comm. v. Heath* (1858) 77 Mass. 303.

upon full consideration, seems to have been that of New Hampshire, in 1861.⁸⁷

Georgia and South Carolina Rule. In addition to the nineteen states mentioned above, the rule that the state has the burden of proof seems to have been adopted in effect also in Georgia and South Carolina, although these courts usually say that the defendant has the burden of proof. The defendant, it is held, must prove his insanity by a preponderance of evidence, but, if upon all the evidence in the case, including the evidence of insanity, the jury have a reasonable doubt of the defendant's guilt, they should acquit.⁸⁸ Since, under such a rule, a reasonable doubt is ultimately sufficient to require an acquittal, it seems these two states must be grouped with those requiring the state to prove responsibility beyond a reasonable doubt, although neither of them has stated the rule in that form.

Burden of Producing Evidence. Even in the states where the ultimate burden of convincing the jury is upon the prosecution, the presumption that all persons are sane⁸⁹ relieves the prosecution from introducing evidence on that subject in the first instance. In other words, although the ultimate burden is on the state, the presumption of sanity throws the immediate burden

⁸⁷ *State v. Bartlett*, 43 N.H. 224.

⁸⁸ *Westmoreland v. State* (1872) 45 Ga. 225; *Carr v. State* (1895) 96 Ga. 284, 22 S.E. 570; *Ryder v. State* (1897) 100 Ga. 528, 28 S.E. 246; *Currie v. State* (1923) 156 Ga. 85, 118 S.E. 724; *Clark v. State* (1928) 167 Ga. 341, 145 S.E. 647; *State v. Paulk* (1882) 18 S.C. 514; *State v. Bundy* (1885) 24 S.C. 439; *State v. McIntosh* (1893) 39 S.C. 97, 17 S.E. 446. Even the Georgia Court of Appeals seems uncertain as to the rule which its Supreme Court has evolved. *Wilson v. State* (1911) 9 Ga. App. 274, 70 S.E. 1128 (burden is on defendant to rebut the inference of sanity, but "the Supreme Court has, however, somewhat mitigated the severity of this rule, and greatly lightened, if not entirely removed, this burden from the accused, by holding that if the jury entertain a doubt on the whole showing, including the question of insanity, they must give the benefit of that doubt to the accused and acquit"). And see *Caison v. State* (1930) 171 Ga. 1, 154 S.E. 337.

⁸⁹ See *post*, p. 161.

of going forward with the evidence upon the defendant. On the question of how much evidence must be produced to overcome the presumption of sanity, and throw the burden of going forward on the state, all the states, except Nebraska, which put the burden of convincing on the state agree that sufficient evidence must be produced to raise a reasonable doubt of defendant's responsibility.⁴⁰ The Nebraska court, however, has expressly held that it is not necessary to produce evidence sufficient to raise a reasonable doubt; that the presumption of sanity holds only in the absence of evidence, but that as soon as any evidence of mental unsoundness is introduced, the state has the burden of convincing the jury of defendant's sanity.⁴¹ All the states which put the ultimate burden on the state agree that the evidence to rebut the presumption of sanity and require the state to go forward with the evidence, may arise either from the defendant's evidence, or from that introduced by the prosecution.⁴²

⁴⁰ *State v. Joseph* (1921) 96 Conn. 637, 115 Atl. 85; *Blocker v. State* (1926) 92 Fla. 878, 892, 110 So. 547; *State v. Wetter* (1905) 11 Ida. 433, 450, 83 Pac. 341; *State v. Tharp* (1930) 48 Ida. 636, 284 Pac. 201; *Lilly v. People* (1894) 148 Ill. 467, 36 N.E. 95; *Guetig v. State* (1879) 66 Ind. 94; *People v. Finley* (1878) 38 Mich. 482, 485; *Cunningham v. State* (1879) 56 Miss. 269; *Alberty v. State* (1914) 10 Okla. Crim. 616, 626, 140 Pac. 1025; *State v. Hadley* (1925) 65 Utah 109, 234 Pac. 940. In most of these cases, the courts said that to overcome the presumption of sanity, there must be sufficient evidence produced to raise a reasonable doubt of the defendant's "sanity," without explaining whether that term was used to mean merely some form of mental disorder or abnormality, or such abnormality as to render the person irresponsible under the legal test. It seems, however, that whenever the point is actually noticed by the courts, they agree that the evidence must raise a reasonable doubt whether the defendant was mentally sound enough to be held criminally responsible, and not merely whether he was afflicted with some lesser degree of unsoundness. See *Lilly v. People*, *supra*.

⁴¹ *Snider v. State* (1898) 56 Neb. 309, 76 N.W. 574; *Maddox v. State* (1922) 108 Neb. 809, 189 N.W. 398; *Williams v. State* (1927) 115 Neb. 277, 212 N.W. 606; *Torske v. State* (1932) 123 Neb. 161, 242 N.W. 408.

⁴² *Pribble v. People* (1910) 49 Colo. 210, 112 Pac. 220; *Hill v. U.S.* (1903) 22 App. D.C. 395; *Blocker v. State* (1926) 92 Fla. 878, 110

§4. PRESUMPTIONS OF SANITY AND INSANITY

Presumption of Sanity. Sanity being the normal condition of the human mind, the prosecution may proceed, in the first instance, upon the presumption that the defendant was sane and responsible when the act was committed.⁴³ To this rule all courts agree.⁴⁴ As to the strength of this presumption, however,

So. 547; *Montag v. People* (1892) 141 Ill. 75, 30 N.E. 337; *Walters v. State* (1915) 183 Ind. 178, 108 N.E. 583; *State v. Johnson* (1914) 92 Kans. 441, 140 Pac. 839; *Cunningham v. State* (1879) 56 Miss. 269; *Davis v. State* (1911) 90 Neb. 361, 133 N.W. 406; *State v. Bartlett* (1861) 43 N.H. 224, 228; *Alberty v. State* (1914) 10 Okla. Crim. 616, 140 Pac. 1025; *Dove v. State* (1872) 50 Tenn. 348; *Duthey v. State* (1907) 131 Wis. 178, 111 N.W. 222.

⁴³ The basis for the presumption of sanity is well explained by the United States Supreme Court, in the leading case of *Davis v. U.S.* (1895) 160 U.S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499. "If that presumption," said the court, "were not indulged, the government would always be under the necessity of adducing affirmative evidence of the sanity of the accused. But a requirement of this character would seriously delay and embarrass the enforcement of the laws against crime, and in most cases be unnecessary. Consequently, the law presumes that everyone charged with crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. It authorizes the jury to assume at the outset that the accused is criminally responsible for his acts. But that is not a conclusive presumption, which the law, upon grounds of public policy, forbids to be overthrown or impaired by opposing proof. It is a disputable, or, as it is often designated, a rebuttable, presumption resulting from the connection ordinarily existing between certain facts. . . ."

⁴⁴ *United States: Davis v. U.S.* (1895) 160 U.S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499; *Alabama: Cutcliff v. State* (1920) 17 Ala. App. 586, 87 So. 706, certiorari denied, 205 Ala. 194, 87 So. 708; *Arkansas: Kelley v. State* (1922) 154 Ark. 246, 242 S.W. 572; *California: People v. Harris* (1914) 169 Cal. 53; *Colorado: DeRinzie v. People* (1914) 56 Colo. 249, 138 Pac. 1009; *Connecticut: State v. Joseph* (1921) 96 Conn. 637, 115 Atl. 85; *Florida: Brown v. State* (1898) 40 Fla. 459, 25 So. 63; *Georgia: Clark v. State* (1928) 167 Ga. 341, 145 S.E. 647; *Illinois: People v. Bacon* (1920) 293 Ill. 210, 127 N.E. 386; *People v. Christensen* (1929) 336 Ill. 251, 168 N.E. 292; *Indiana: McHargue v. State* (1923) 193 Ind. 204, 139 N.E. 316; *Kentucky: Feree v. Comm.* (1922) 193 Ky. 347, 236 S.W. 246; *Missouri: State v. Rose* (1917) 271 Mo. 17, 195 S.W. 1013; *Montana: State v.*

the courts, as we have seen, differ sharply. Those which place the burden of proof on the state hold that the presumption merely relieves the prosecution from introducing proof that the defendant was sane, until that issue is raised by the introduction of evidence tending to show that he was insane and irresponsible, i.e., that the presumption prevails only until reasonable doubt is cast upon it. On the other hand, the courts which put the burden of proving insanity on the defendant say that the presumption prevails until the contrary is established ("to the satisfaction of the jury" or "by the preponderance of evidence," according to the rule in each state). The reports abound in long discussions of these conflicting doctrines, and able opinions have been written to support each view.⁴⁵

Presumption of Sanity: Weight as Evidence. Ordinarily, presumptions in the law merely state strong probabilities, based on human experience. Certain facts being usually true, the law assumes them to be true in each particular case, in the absence of proof of the contrary. But when evidence is introduced raising

Sheldon (1917) 54 Mont. 185, 169 Pac. 37; *Nebraska*: Shannon v. State (1923) 111 Neb. 457, 196 N.W. 635; *New Mexico*: Terr. v. McNabb (1911) 16 N. Mex. 625, 120 Pac. 907; *New York*: People v. Egnor (1903) 175 N.Y. 419, 67 N.E. 906; People v. Tobin (1903) 176 N.Y. 278, 68 N.E. 359; *Oklahoma*: Adams v. State (1928) 40 Okla. 44, 266 Pac. 790; *Rhode Island*: State v. Quigley (1904) 26 R.I. 263, 58 Atl. 905; *Tennessee*: King v. State (1892) 91 Tenn. 617, 20 S.W. 169; *Texas*: Newman v. State (1924) 99 Tex. Crim. 363, 269 S.W. 440; *Utah*: State v. Hadley (1925) 65 Utah 109, 234 Pac. 940; *Washington*: State v. Harris (1913) 74 Wash. 60, 132 Pac. 735; *West Virginia*: State v. Cook (1911) 69 W. Va. 717, 72 S.E. 1025; *Wisconsin*: Sorenson v. State (1922) 178 Wis. 197, 188 N.W. 622.

⁴⁵ For leading cases placing the burden of proof where insanity is raised as a defense to crime, (1) on the prosecution: Davis v. U.S. (1895) 160 U.S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499; State v. Shuff (1903) 9 Ida. 115, 72 Pac. 664; Hopps v. People (1863) 31 Ill. 385; People v. Garbutt (1868) 17 Mich. 9; State v. Bartlett (1861) 43 N.H. 224; People v. McCann (1857) 16 N.Y. 58; (2) on defendant: State v. Lewis (1889) 20 Nev. 333, 22 Pac. 241; Kelch v. State (1896) 55 Ohio 146, 45 N.E. 6; Ortwein v. Comm. (1874) 76 Pa. 414, 423; State v. Quigley (1904) 26 R.I. 263, 58 Atl. 905.

a reasonable doubt of the matter, the presumption is rebutted. It becomes *functus officio*, and has no further part or weight in the case. Sometimes, for reasons of policy, certain presumptions are said to prevail until the contrary is "clearly" or "satisfactorily" proved. And we have seen that in about half of the American states, the courts hold that the presumption of sanity in criminal cases is not rebutted except upon "satisfactory" or "preponderating" evidence. Such a rule seems to give the presumption some weight as evidence, but the rule can be understood upon the explanation of policy.

Less understandable, however, is the fact that even the courts which put the ultimate burden on the prosecution, and which hold that the presumption of sanity merely relieves the prosecution from proving sanity until the issue is raised, seem to give some weight as evidence to the presumption. It is very commonly said by these courts that the jury is to determine, upon all the evidence, including the presumption of sanity; whether there is a reasonable doubt of the defendant's responsibility.⁴⁶ In some cases, this language may have been used inadvertently, but the highest court of at least one state—Massachusetts—has adopted this view deliberately, saying that the presumption of sanity "which is at first in one of the scales is not removed from its place merely because something is put in the other. It still remains where it was first placed, and to the end plays its proper part in helping to tip that scale down."⁴⁷

This view seems to have been accepted in a few other states,⁴⁸

⁴⁶ Davis v. U.S., *supra*; Guiteau's Case (1882) 10 Fed. 161, 163; DeRinzie v. People (1914) 56 Colo. 249, 138 Pac. 1009; State v. Nixon (1884) 32 Kans. 205, 4 Pac. 159; State v. Johnson (1914) 92 Kans. 441, 140 Pac. 839; Comm. v. Spencer (1912) 212 Mass. 438, 453, 99 N.E. 266; Brotherton v. People (1878) 75 N.Y. 159, 163; People v. Tobin (1903) 176 N.Y. 278, 68 N.E. 359; Alberty v. State (1914) 10 Okla. Crim. 616, 627, 140 Pac. 1025.

⁴⁷ Comm. v. Spencer, *supra*.

⁴⁸ People v. Harris (1914) 169 Cal. 53, 145 Pac. 520; DeRinzie v. People (1914) 56 Colo. 249, 138 Pac. 1009.

but elsewhere the courts have held the contrary, saying that the presumption of sanity is not evidence of sanity, and cannot be treated as evidence.⁴⁹

Presumption that Chronic Insanity Continues: "Lucid Intervals." The courts of a score or more of jurisdictions have said that when permanent, chronic, or continuous insanity is once proved to have existed at some time prior to the alleged crime, it will be presumed to have continued, and to have existed at the time of the alleged crime, unless the contrary is proved.⁵⁰ This presumption arises especially upon proof of a prior adjudication of insanity, by proceedings *de lunatico inquirendo*, etc., but the cases do not seem to limit the rule to such proof; the presumption seems to hold, by whatever evidence the prior insanity may be proved.

However, no such presumption arises from proof of a prior

⁴⁹ *People v. Cochran* (1924) 313 Ill. 508, 145 N.E. 207; *State v. Pike* (1869) 49 N.H. 399, 408, 444; *State v. Green* (1931) 78 Utah 580, 6 Pac. (2d) 177; *Duthey v. State* (1907) 131 Wis. 178, 111 N.W. 222.

⁵⁰ *Alabama*: *Ford v. State* (1882) 71 Ala. 385; *Odom v. State* (1911) 174 Ala. 4, 56 So. 913; *California*: *People v. Francis* (1869) 38 Cal. 183; *Connecticut*: *State v. Johnson* (1873) 40 Conn. 136; *Delaware*: *State v. Brown* (1878) Hous. Crim. Cas. 539; *Florida*: *Armstrong v. State* (1892) 30 Fla. 170, 11 So. 618, 17 L.R.A. 484; *Cochran v. State* (1913) 65 Fla. 91, 61 So. 187; *Thomson v. State* (1919) 78 Fla. 400, 83 So. 291; *Georgia*: *Allams v. State* (1905) 123 Ga. 500, 51 S.E. 506; *Illinois*: *Langdon v. People* (1890) 133 Ill. 382, 24 N.E. 874; *People v. Maynard* (1932) 347 Ill. 422, 179 N.E. 833; *Indiana*: *Goodwin v. State* (1884) 96 Ind. 550; *Iowa*: *State v. Robbins* (1899) 109 Ia. 650, 80 N.W. 1061; *Kansas*: *State v. Reddick* (1871) 7 Kans. 143; *Mississippi*: *Ford v. State* (1896) 73 Miss. 734, 19 So. 665, 35 L.R.A. 117; *Missouri*: *State v. Lowe* (1887) 93 Mo. 547, 5 S.W. 889; *State v. Herring* (1916) 268 Mo. 514, 188 S.W. 169; *New Jersey*: *State v. Spencer* (1846) 21 N.J.L. 196; *New York*: *People v. Montgomery* (1871) 13 Abb. Pr. N.S. 207; *Ohio*: *Wheeler v. State* (1878) 34 Ohio 394; *In re Remus* (1928) 119 Ohio 166, 162 N.E. 740; *Pennsylvania*: *Comm. v. Alione* (1928) 293 Pa. 208, 142 Atl. 216; *Comm. v. Winemore* (1867) 1 Brewst. 356; *Tennessee*: *Green v. State* (1890) 88 Tenn. 614, 14 S.W. 430; *Texas*: *Hunt v. State* (1894) 33 Tex. Crim. 252, 26 S.W. 206; *Sims v. State* (1907) 50 Tex. Crim. 563, 99 S.W. 555; *Francks v.*

insane condition which was merely temporary in character.⁵¹ Delirium tremens, or other mental derangement immediately resulting from the use of intoxicating liquor, is therefore not presumed to continue.⁵² If a person, though suffering from mental disorder, has what the law calls "lucid intervals,"⁵³ it has been held that he is liable for what he does in those intervals, as if he had no deficiency,⁵⁴ and the presumption will be that the act charged was committed during a lucid interval.⁵⁵

State (1928) 109 Tex. Crim. 440, 5 S.W. (2d) 157; *Washington: Ex parte Brown* (1905) 39 Wash. 160, 81 Pac. 552; *Wisconsin: State v. Wilner* (1876) 40 Wis. 304.

⁵¹ See cases above. Since some forms of insanity are only periodic, "to presume here that the insanity will continue is mere error." G. F. Arnold, quoted by Wigmore, *Principles of Judicial Proof* (1913), p. 354. A Tennessee case has held that the presumption applies to occasional or temporary insanity, and that if the defendant had a temporary attack shortly before the commission of the offense, and is not shown to have recovered his sanity at the time of the offense, the law presumes his condition to remain as last shown. Overall v. State (1885) 15 Lea 672. This case does not seem to have been overruled. See Green v. State (1890) 88 Tenn. 614, 14 S.W. 430.

⁵² *People v. Francis* (1869) 38 Cal. 183; *State v. Kavanaugh* (1902) 20 Del. 131, 53 Atl. 335; *People v. Bremer* (1914) 24 Cal. App. 315, 141 Pac. 222; *Armstrong v. State* (1892) 30 Fla. 170, 11 So. 618; *Goodwin v. State* (1884) 96 Ind. 550; *State v. Reddick* (1871) 7 Kans. 143; *State v. Potts* (1888) 100 N.C. 457, 6 S.E. 657.

⁵³ Psychiatrists do not recognize any such phenomenon as the law understands by "lucid intervals," but they do recognize that in certain mental disorders, as the manic depressive psychoses (cyclothymoses), there are, between attacks, "remissions," during which "the patients are to all intents and purposes perfectly normal." Glueck, *Mental Disorder and the Criminal Law* (1925), p. 374. During such remissions, however, the patients are not in fact completely "lucid" as the law understands that term. "And if a 'lucid interval' does not indicate a complete restoration of the mind, it is a misnomer, and should be abandoned." Wharton and Stillé, *Med. Jur.* (5th ed., 1905), vol. i, p. 503.

⁵⁴ *Clark v. State* (1928) 167 Ga. 341, 145 S.E. 647.

⁵⁵ *Ford v. State* (1882) 71 Ala. 385; *Russell v. State* (1918) 201 Ala. 572, 78 So. 916; *People v. Keyes* (1918) 178 Cal. 794, 175 Pac. 6; *Leache v. State* (1886) 22 Tex. App. 279, 3 S.W. 539; *Gray v. State* (1924) 99

On the other hand, it has been held in some cases that where there is evidence of chronic insanity, the burden is on the prosecution to prove that the crime was committed during a lucid interval, the presumption being that such insanity existed at the time of the offense.⁵⁶ Still other cases have said that there is no presumption of law either way, and while it is doubtless true that certain forms of mental unsoundness, as, for example, congenital idiocy, are incurable, the presumption of continuance in such cases is one of fact and not of law.⁵⁷

The effect of the presumption of continuance almost everywhere is merely to shift the burden of going forward with the evidence. If the defendant proves that at some time prior to the alleged crime he was afflicted with a chronic mental disorder, from which he has not been shown to have recovered, this disorder is presumed to have continued and to have existed at the time of the crime charged, and the prosecution thereupon must overcome this presumption by evidence affirmatively tending to prove that the defendant was sane at the time of the crime. In Texas, however, it has been held that the presumption of continuance not only shifts this burden of going forward with the evidence, but also the ultimate burden of convincing the jury. The Texas Court of Criminal Appeals has committed itself

Tex. Crim. 305, 268 S.W. 941; *McKenny v. State* (1926) 105 Tex. Crim. 353, 288 S.W. 465; *Trahan v. State* (1931) 35 S.W. (2d) 169. The conception of mental disorder upon which this rule of law is based is at least three hundred years old. Lord Hale laid it down as law in the seventeenth century: If a man be a lunatic, and has lucid intervals ("which," he said, "ordinarily happens between the full and change of the moon"), yet the law presumes the act or offense of such person to be committed in those intervals, unless the contrary be proved. Hale, P.C. 34.

⁵⁶ *Ford v. State* (1896) 73 Miss. 734, 19 So. 665, 35 L.R.A. 117; *State v. Wade* (1901) 161 Mo. 441, 61 S.W. 800; *State v. Paulsgrove* (1907) 203 Mo. 193, 101 S.W. 27.

⁵⁷ *Smedley v. Comm.* (1910) 138 Ky. 1, 11, 127 S.W. 485, 129 S.W. 547; *State v. Austin* (1905) 71 Ohio 317, 73 N.E. 218.

to the proposition that, although the general rule is that the defendant bears the ultimate burden of convincing the jury by a preponderance of evidence that he was insane and irresponsible at the time of the act charged, yet when chronic insanity is once proved to have existed, it is presumed to continue, and the burden is thereupon shifted to the state to prove beyond a reasonable doubt that the defendant was sane at the time of the offense.⁵⁸

In Pennsylvania, it has been expressly denied that the defendant's burden can be shifted to the state by proof of insanity prior to the time of the offense.⁵⁹

⁵⁸ *Hunt v. State* (1894) 33 Tex. Crim. 252, 263, 26 S.W. 206; *Morse v. State* (1913) 68 Tex. Crim. 351, 152 S.W. 927; *Yantis v. State* (1923) 95 Tex. Crim. 541, 255 S.W. 180; *Francks v. State* (1928) 109 Tex. Crim. 440, 5 S.W. (2d) 157. A Georgia case has also held that it is no error to charge that upon proof of prior insanity the state has the burden of proving that the defendant was "of sound memory and discretion" at the time of the crime, but said that the state must prove this "to the reasonable satisfaction of the jury, by a preponderance of the evidence." *Allams v. State* (1905) 123 Ga. 500, 51 S.E. 506. In Missouri, too, it has been held that when chronic insanity is shown to have existed at some time before the crime, such insanity will be presumed to continue, and the burden of proving that the accused was mentally responsible at the time of the act rested upon the state, and that it was error to refuse an instruction to that effect. *State v. Lowe* (1887) 93 Mo. 547, 5 S.W. 889. In subsequent cases, however, the Missouri court, while affirming that this would be a correct rule in proper cases, has managed to avoid applying it. Rather, it has restricted the rule by holding that when the evidence shows that if the defendant was insane previous to the homicide, he continued so, and that there were no lucid intervals, the rule of *State v. Lowe* does not apply. *State v. Schaefer* (1893) 116 Mo. 96, 22 S.W. 447; *State v. Bobbst* (1916) 269 Mo. 214, 190 S.W. 257.

⁵⁹ *Comm. v. Calhoun* (1913) 238 Pa. 474, 486, 86 Atl. 472: "It has never been held in our criminal jurisprudence that when insanity is proved to have existed at any indefinite time in the past, it is presumed in law to continue up to the time of the commission of a crime at some subsequent date; much clearer proof of insanity at the time of the commission of the deed is required in order to excuse a homicide."

§5. TREND OF THE LAW

Tendency is to Demand Less Proof to Support Plea of Insanity. There has been a decided difference of opinion concerning the trend of the American jurisdictions toward one or the other of the burden of proof rules.⁶⁰ An examination of the cases and statutes reveals that the tendency has been, and still seems to be, to require a decreasing amount of evidence to entitle a defendant to an acquittal on the ground of insanity. Fourteen states have at some time in their history changed or reworded their rule in such cases, and in only two of the fourteen has the change been to put a greater burden on the defendant; in both of these, the change was effected not by judicial decision, but by statute.⁶¹ Of the other twelve, six have abandoned the rule requiring the defendant to convince the jury of his defense of insanity, in favor of the rule that mental respon-

⁶⁰ Professor Jones, in his work on *Evidence*, stated that the tendency was toward decreasing stringency in the rule. Jones, *Evid.* (2d ed., 1908), §188. Dean Wigmore says that the rule putting the burden on the accused is being "adopted by an increasing number of courts." Wigmore, *Evid.* (2d ed., 1923), vol. v, §2501.

⁶¹ *Alabama*: Code (1928), §4572 (defense of insanity "shall be clearly proved to the reasonable satisfaction of the jury"). Before this section was enacted, in 1889, the courts had required only "a preponderance of evidence." *Boswell v. State* (1879) 63 Ala. 307, 322. The words "clearly" and "to the reasonable satisfaction" of the jury, seem to require something more than a mere preponderance of evidence, so the statute seems to have increased to some degree the quantum of evidence which the defendant must produce. Were it not for this statute, it seems that the court would require the defendant merely to produce enough evidence to raise a reasonable doubt. It has been held that, in general, the defendant need only raise a reasonable doubt of the existence of affirmative defenses like self-defense, etc., and the court has implied that the statute alone prevents this general rule from applying to the defense of insanity. *Clemmons v. State* (1910) 167 Ala. 20, 52 So. 467; *Roberson v. State* (1913) 183 Ala. 43, 62 So. 837. *Montana*: Laws (1925), chap. 87 ("When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven by the defendant by a preponderance of the testimony"). Be-

sibility at the time of the offense charged must be proved by the state beyond reasonable doubt.⁶² The other six still require the defendant to establish his irresponsibility, but instead of requiring this defense to be proved "clearly" or "beyond reasonable

fore this act was passed, the courts had held that the defendant need only raise a reasonable doubt of his mental responsibility. *State v. Colbert* (1920) 58 Mont. 584, 593, 194 Pac. 145.

⁶² *Idaho*: Formerly required defendant to prove irresponsibility by preponderance of evidence. *People v. Walter* (1871) 1 Ida. 386; *State v. Hurst* (1895) 4 Ida. 345, 39 Pac. 554; *State v. Larkins* (1897) 5 Ida. 200, 47 Pac. 945. Now holds that defendant need only raise a reasonable doubt, whereupon burden is on state to prove responsibility beyond reasonable doubt. *State v. Shuff* (1903) 9 Ida. 115, 128, 72 Pac. 664; *State v. Wetter* (1905) 11 Ida. 433, 450, 83 Pac. 341. *Illinois*: Early case required "satisfactory evidence" of irresponsibility. *Fisher v. People* (1860) 23 Ill. 283. Soon afterward, adopted rule that burden is on state, to prove responsibility beyond reasonable doubt. *Hopps v. People* (1863) 31 Ill. 385. This is still the law. *People v. Krauser* (1925) 315 Ill. 485, 146 N.E. 593. *Massachusetts*: Early cases required evidence of insanity "satisfactory to the jury." *Comm. v. Rogers* (1844) 7 Metc. 500. Later changed to rule that burden is on state, to prove responsibility beyond reasonable doubt. *Comm. v. Heath* (1858) 77 Mass. 303; *Comm. v. Spencer* (1912) 212 Mass. 438, 99 N.E. 266. *Mississippi*: Early case said presumption of sanity prevails until the contrary is "clearly proved." *Newcomb v. State* (1859) 37 Miss. 383, 2 Morris St. Cas. 1303, 1325. Now it is held that when a reasonable doubt arises, the state must establish responsibility. *Cunningham v. State* (1879) 56 Miss. 269; *Ford v. State* (1896) 73 Miss. 734, 19 So. 665. *New York*: Has run entire course of possible rules. Early cases required defendant to prove insanity "beyond reasonable doubt." *Sellick's Case* (1816) 1 City Hall Rec. 185. Later, it was held he need produce only a preponderance of evidence. *People v. McCann* (1857) 16 N.Y. 58; *People v. Schryver* (1870) 42 N.Y. 1. Still later, it was held that the state has the burden of proving mental responsibility, but only by a preponderance of evidence. *People v. Nino* (1896) 149 N.Y. 317, 328, 43 N.E. 853. Now it is settled that the state must prove responsibility beyond a reasonable doubt. *People v. Egnor* (1903) 175 N.Y. 419, 427, 67 N.E. 906. *Utah*: Formerly held burden of proving mental irresponsibility was on defendant. *People v. Calton* (1888) 5 Utah 451, 16 Pac. 902; *People v. Dillon* (1892) 8 Utah 92, 30 Pac. 150. Now it is held that defendant need only create reasonable doubt. *State v. Brown* (1909) 36 Utah 46, 58, 102 Pac. 641; *State v. Hadley* (1925) 65 Utah 109, 234 Pac. 940.

doubt," as formerly, these states now hold that "preponderating" or "satisfactory" evidence is sufficient.⁶³ No court has ever overruled its prior decisions to increase the quantum of evidence which the defendant must produce, nor has any court which has adopted the rule that the burden is on the state ever abandoned that rule in favor of one more stringent.

⁶³ *California*: The rule here has been from the earliest case that the defendant must convince of his lack of responsibility by a preponderance of evidence. *People v. Myers* (1862) 20 Cal. 518; *People v. Gilberg* (1925) 197 Cal. 306, 240 Pac. 1000. But some early cases added, "in other words, insanity must be *clearly* established by satisfactory proof." *People v. McDonnell* (1873) 47 Cal. 134; *People v. Wilson* (1874) 49 Cal. 13. This was later held error, in that "clearly" put too great a burden on the defendant. *People v. Wreden* (1881) 59 Cal. 392; *People v. Preciado* (1916) 31 Cal. App. 519, 160 Pac. 1090. *Delaware*: Defendant must prove his defense of insanity "clearly and satisfactorily and beyond a reasonable doubt." *State v. Pratt* (1867) Hous. Crim. Cas. 249, 268; *State v. West* (1873) Hous. Crim. Cas. 371. Now, defendant need only produce "satisfactory" proof. *State v. Harrigan* (1881) 9 Hous. 369, 31 Atl. 1052; *State v. Jack* (1903) 20 Del. 470, 58 Atl. 833. *Georgia*: Accused must prove his defense of insanity "clearly." *Choice v. State* (1860) 31 Ga. 424. Now held that defendant must prove this defense by preponderance of evidence, but that evidence of insanity should be considered in determining whether there is a reasonable doubt of guilt. *Currie v. State* (1923) 156 Ga. 85, 118 S.E. 724. *Louisiana*: Defendant must prove irresponsibility "clearly." *State v. Coleman* (1875) 27 La. Ann. 691. And "beyond a reasonable doubt." *State v. DeRance* (1882) 34 La. Ann. 186. This latter requirement was overruled in *State v. Scott* (1897) 49 La. Ann. 253, 21 So. 271, where it was said that "clear and convincing proof" is all that is required. Latest cases state the rule as requiring merely a preponderance of evidence. *State v. Surrency* (1921) 148 La. 983, 88 So. 240. *New Jersey*: Defendant must prove insanity beyond reasonable doubt. *State v. Spencer* (1846) 21 N.J.L. 196. Later cases require only a preponderance of evidence, satisfactory to the jury. *State v. Herron* (1908) 77 N.J.L. 523, 71 Atl. 274; *State v. Overton* (1913) 85 N.J.L. 287, 88 Atl. 689. *Ohio*: Defendant required to prove irresponsibility to the satisfaction of the jury, "by clear or circumstantial proof." *Clark v. State* (1843) 12 Ohio Rep. 483, 495; *Farrer v. State* (1853) 2 Ohio St. 54. Now held that a mere preponderance is all that is necessary, and that it is error to require anything more. *Kelch v. State* (1896) 55 Ohio 146, 45 N.E. 6; *State v. Hauser* (1920) 101 Ohio 404, 131 N.E. 66.

There is no indication that this tendency to adopt the so-called American rule is less pronounced today than formerly. From 1895, when the United States Supreme Court adopted this rule, to the present, the question has arisen for the first time in the supreme courts of five states. In these five cases of first impression, where the courts were free to adopt either view solely upon its merits, the rule that the prosecution has the burden of convincing of the defendant's responsibility was adopted by four,⁶⁴ and the rule that the defense must convince of irresponsibility by one.⁶⁵

It is true that the most recent change of rule, effected by the Montana legislature in 1925, abandons the rule established by the Montana courts, that the prosecution has the burden of proof, and expressly requires the defendant to prove his defense of insanity by a preponderance of testimony, but this instance, standing alone, can hardly be said to represent a tendency.

⁶⁴ *Colorado*: *Jones v. People* (1896) 23 Colo. 276, 47 Pac. 275. *Montana*: *State v. Brooks* (1899) 23 Mont. 146, 163, 57 Pac. 1038. This rule has been changed by the legislature, to require the defendant to prove the defense of insanity by a preponderance of testimony. Mont. Laws (1925), chap. 87. *Oklahoma*: *Maas v. Terr.* (1901) 10 Okla. 714, 63 Pac. 960. *Wyoming*: *Pressler v. State* (1907) 16 Wyo. 214, 92 Pac. 806.

⁶⁵ *State v. Quigley* (1904) 26 R.I. 263, 58 Atl. 905.

DIGEST

THE BURDEN OF PROOF ON THE ISSUE OF MENTAL
IRRESPONSIBILITY IN CRIMINAL CASES

UNITED STATES

The prosecution has the burden of proving sanity beyond reasonable doubt. *Davis v. U.S.* (1895) 160 U.S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499; *Battle v. U.S.* (1907) 209 U.S. 36, 28 Sup. Ct. 422, 52 L. Ed. 670; *Matheson v. U.S.* (1912) 227 U.S. 540, 33 Sup. Ct. 355, 57 L. Ed. 631; *Guiteau's Case* (1882) 10 Fed. 161; *U.S. v. Faulkner* (1888) 35 Fed. 730; *German v. U.S.* (1903) 120 Fed. 666.

Until evidence of insanity is introduced, the burden is satisfied by the presumption that all men are sane. *Battle v. U.S.*, *supra*.

In some of the older cases, juries were instructed that the defendant had the burden of proving insanity. *U.S. v. McGlue* (1851) 1 Curtis C.C. 1; *U.S. v. Holmes* (1858) Fed. Cas. No. 15,382, 1 Cliff. 98; *U.S. v. Ridgeway* (1887) 31 Fed. 144; *In re Cashman* (1909) 168 Fed. 1008.

ALABAMA

By statute, it is fixed that "the defense of insanity in all criminal prosecutions shall be clearly proved to the reasonable satisfaction of the jury." Code (1928), §4572. *Rayfield v. State* (1910) 167 Ala. 94, 52 So. 833; *McGhee v. State* (1912) 178 Ala. 4, 59 So. 573; *Rice v. State* (1920) 204 Ala. 104, 85 So. 437; *Wade v. State* (1921) 18 Ala. App. 322, 92 So. 97, judgment reversed, 207 Ala. 1, 92 So. 101; *Guinn v. State* (1928) 22 Ala. App. 331, 115 So. 417; *Waters v. State* (1929) 22 Ala. App. 644, 119 So. 248.

This section became law in 1889. Before that time, the cases had established the rule that defendant had the burden of proving insanity, by a preponderance of evidence. *Boswell v. State* (1879) 63 Ala. 307; *Ford v. State* (1882) 71 Ala. 385; *Parsons v. State* (1886) 81 Ala. 577, 2 So. 854; *Gunter v. State* (1887) 83 Ala. 96, 3 So. 600; *Maxwell v. State* (1889) 89 Ala. 150, 7 So. 824; *Fonville v. State* (1890) 91 Ala. 39, 8 So. 688; *Martin v. State* (1898) 119 Ala. 1, 25 So. 255; *Lide v. State* (1901) 133 Ala. 43, 31 So. 953.

It seems that the court does not construe the requirement that de-

fendant prove insanity "clearly" to mean "beyond a reasonable doubt." An instruction which seemed to require proof beyond a reasonable doubt was held error, because it exacted from defendant "a far higher measure of proof than the law requires." *Smith v. State* (1913) 182 Ala. 38, 62 So. 184.

The statute is constitutional and does not invade "any constitutional right of the defendant in imposing upon him the burden of proving the plea of insanity." *Martin v. State* (1898) 119 Ala. 1, 25 So. 255.

ARIZONA

To acquit a defendant on the ground of insanity, the jury "must entertain a reasonable doubt of his ability to distinguish right and wrong as applied to the act involved." *Lauterio v. State* (1921) 23 Ariz. 15, 201 Pac. 91.

ARKANSAS

The burden is on the defendant to establish insanity by a preponderance of the evidence. *Casat v. State* (1883) 40 Ark. 511; *Coates v. State* (1887) 50 Ark. 330, 7 S.W. 304; *Williams v. State* (1888) 50 Ark. 511, 9 S.W. 5; *Bolling v. State* (1891) 54 Ark. 588, 16 S.W. 658; *Bailey v. State* (1912) 105 Ark. 228, 150 S.W. 1030; *Schuman v. State* (1913) 106 Ark. 362, 153 S.W. 611; *Bell v. State* (1915) 120 Ark. 553, 180 S.W. 186; *Diggs v. State* (1916) 126 Ark. 455, 190 S.W. 448; *Woodall v. State* (1921) 149 Ark. 33, 231 S.W. 186; *Woodall v. State* (1921) 150 Ark. 394, 234 S.W. 266; *Kelley v. State* (1920) 146 Ark. 509, 226 S.W. 137.

CALIFORNIA

The burden of proving insanity is on the defendant, and he must establish it by a preponderance of the evidence. *People v. Myers* (1862) 20 Cal. 518; *People v. Coffman* (1864) 24 Cal. 230; *People v. McDonell* (1873) 47 Cal. 134; *People v. Wilson* (1875) 49 Cal. 13; *People v. Bell* (1875) 49 Cal. 485; *People v. Ferris* (1880) 55 Cal. 588; *People v. Wreden* (1881) 59 Cal. 392; *People v. Messersmith* (1882) 61 Cal. 246; *People v. Pico* (1882) 62 Cal. 50; *People v. Hamilton* (1882) 62 Cal. 377; *People v. Eubanks* (1890) 86 Cal. 295, 24 Pac. 1014; *People v. Travers* (1891) 88 Cal. 233, 26 Pac. 88; *People v. Baw-*

den (1891) 90 Cal. 195, 27 Pac. 204; *People v. McNulty* (1892) 93 Cal. 427, 26 Pac. 597, 29 Pac. 61; *People v. Bemmerly* (1893) 98 Cal. 299, 33 Pac. 263; *People v. Ward* (1894) 105 Cal. 335, 38 Pac. 945; *People v. Allender* (1897) 117 Cal. 81, 48 Pac. 1014; *People v. Barthleman* (1898) 120 Cal. 7, 52 Pac. 112; *People v. Hettick* (1899) 126 Cal. 425, 58 Pac. 918; *People v. Suesser* (1904) 142 Cal. 354, 75 Pac. 1093; *People v. Nihell* (1904) 144 Cal. 200, 77 Pac. 916; *People v. Wells* (1904) 145 Cal. 138, 78 Pac. 470; *People v. Willard* (1907) 150 Cal. 543, 89 Pac. 124; *People v. Oppenheimer* (1909) 156 Cal. 733, 106 Pac. 74; *People v. Harris* (1914) 169 Cal. 53, 145 Pac. 520; *People v. Loomis* (1915) 170 Cal. 347, 149 Pac. 581; *People v. Miller* (1916) 171 Cal. 649, 154 Pac. 468; *People v. Keyes* (1918) 178 Cal. 794, 175 Pac. 6; *People v. Morisawa* (1919) 180 Cal. 148, 179 Pac. 888; *People v. Williams* (1920) 184 Cal. 590, 194 Pac. 1019; *People v. Reid* (1924) 193 Cal. 49, 225 Pac. 859; *People v. Gilberg* (1925) 197 Cal. 306, 240 Pac. 1000; *People v. Sloper* (1926) 198 Cal. 238, 244 Pac. 362; *People v. Hickman* (1928) 204 Cal. 470, 268 Pac. 909; *People v. Leong Fook* (1928) 206 Cal. 64, 273 Pac. 779; *People v. Croce* (1929) 208 Cal. 123, 280 Pac. 526; *People v. Ashland* (1912) 20 Cal. App. 168, 128 Pac. 798; *People v. Preciado* (1916) 31 Cal. App. 519, 160 Pac. 1090; *People v. Zari* (1921) 54 Cal. App. 133, 201 Pac. 345.

Some of the earlier cases said that "insanity must be clearly established by satisfactory proof." *People v. McDonell* (1873) 47 Cal. 134; *People v. Wilson* (1875) 49 Cal. 13.

But this was held error soon afterward, on the ground that before a fact can be clearly established, it must be established beyond reasonable doubt, and requiring the defendant to prove insanity beyond reasonable doubt is erroneous. *People v. Wreden* (1881) 59 Cal. 392; *People v. Wells* (1904) 145 Cal. 138, 78 Pac. 470; *People v. Preciado* (1916) 31 Cal. App. 519, 160 Pac. 1090.

Instructions that insanity must be "satisfactorily" established have also been disapproved, though never held erroneous. *People v. Messersmith* (1882) 61 Cal. 246; *People v. Hamilton* (1882) 62 Cal. 377; *People v. Sloper* (1926) 198 Cal. 238, 244 Pac. 362. Preponderance of the evidence does not mean "evidence which proves to a moral certainty." It means only evidence that is more than, outweighs, pre-

ponderates over, the evidence on the other side, not necessarily in quantity, but in its effect on those to whom it is addressed. *People v. Miller* (1916) 171 Cal. 649, 154 Pac. 468.

COLORADO

The prosecution has the burden of proving sanity beyond a reasonable doubt. *Jones v. People* (1896) 23 Colo. 276, 47 Pac. 275; *Pribble v. People* (1910) 49 Colo. 210, 112 Pac. 220; *Ryan v. People* (1911) 50 Colo. 99, 114 Pac. 306; *DeRinzie v. People* (1914) 56 Colo. 249, 138 Pac. 1009; *Bulger v. People* (1915) 60 Colo. 165, 151 Pac. 937; *Shank v. People* (1926) 79 Colo. 576, 247 Pac. 559.

However, the presumption being that all men are sane, the defendant has the burden in the first instance of introducing evidence, sufficient to raise a reasonable doubt. *Pribble v. People*, *supra*. "If, upon all the evidence, including the presumption of sanity, a reasonable doubt exists as to the sanity of the defendant, he must be acquitted." *DeRinzie v. People*, *supra*.

Merely entering a plea of not guilty by reason of insanity is not sufficient to cast the burden upon the prosecution to prove sanity. *Ingles v. People* (1931) 90 Colo. 51, 6 Pac. (2d) 455.

CONNECTICUT

The state has the burden of proving sanity beyond a reasonable doubt. *State v. Johnson* (1873) 40 Conn. 136; *State v. Joseph* (1921) 96 Conn. 637, 115 Atl. 85.

In the first instance, the state may rest on the presumption of sanity. "If the defense be insanity, it is to be proved substantially as an independent fact, and the burden of proof is on the accused. Upon this issue he goes forward and the state rebuts." *State v. Hoyt* (1878) 46 Conn. 330. But if the defense does introduce evidence of insanity, which the state fails to rebut, that is not sufficient to require a verdict directed for defendant. The jury must still determine whether or not there is a reasonable doubt of sanity. *State v. Joseph*, *supra*.

DELAWARE

Every man is presumed sane until the contrary is proved to the satis-

faction of the jury. Defendant has the burden of establishing insanity by satisfactory proof. *State v. Harrigan* (1881) 9 Houston 369, 31 Atl. 1052; *State v. Cole* (1899) 18 Del. 344, 45 Atl. 391; *State v. Jack* (1903) 20 Del. 470, 58 Atl. 833.

This rule seems also to be required by statute, although none of the cases base it on that ground. Rev. Code (1915), §2606 says that "If . . . the defense of insanity shall be made and established to the satisfaction of the jury . . . it shall be the duty of the jury to return a verdict of 'not guilty by reason of insanity. . . .'"

The earlier cases said that defendant had to prove insanity clearly and satisfactorily and beyond a reasonable doubt. *State v. Pratt* (1867) Houston Crim. Cas. 249; *State v. West* (1873) Houston Crim. Cas. 371.

On the other hand, one important case squarely laid down the rule that the presumption of sanity holds only until proof of insanity is introduced, and that defendant's burden is only to raise a reasonable doubt of sanity, whereupon the burden shifts to the state to produce testimony to resolve the doubt. *State v. Reidell* (1888) 9 Houston 470, 14 Atl. 550. The decision of this case on the point is simply disregarded by later decisions.

Where permanent insanity is once proved to exist, it is presumed to continue until restoration is proved by evidence. *State v. Brown* (1878) Houston Crim. Cas. 539. But no such presumption of continuance is raised where the insanity is only temporary in character. *State v. Jack* (1903) 20 Del. 470, 58 Atl. 833.

DISTRICT OF COLUMBIA

The jury, to convict the defendant, must be satisfied beyond a reasonable doubt, that he is sane. *U.S. v. Sickles* (1859) 2 Hayward & Hazelton's C.C. Rep. 319; *Guiteau's Case* (1882) 10 Fed. 161; *Snell v. U.S.* (1900) 16 App. D.C. 501; *Hill v. U.S.* (1903) 22 App. D.C. 395.

The law presumes everyone to be sane, and so the burden is on defendant, in the first instance, to bring forward proofs that he is insane. But after all the evidence is in, if the jury have a reasonable doubt upon the subject, defendant is entitled to the benefit of that doubt. *U.S. v. Sickles, supra*; *Guiteau's Case, supra*.

FLORIDA

If the jury has a reasonable doubt of sanity, they should acquit. The presumption is that defendant is sane, and the burden is on him to introduce evidence of insanity. However, if evidence of insanity is introduced by either side, sufficient to raise a reasonable doubt, the burden is on the state to prove sanity, beyond reasonable doubt. *Hodge v. State* (1890) 26 Fla. 11, 7 So. 593; *Armstrong v. State* (1891) 27 Fla. 366, 9 So. 1; *Armstrong v. State* (1892) 30 Fla. 170, 11 So. 618; *Brown v. State* (1898) 40 Fla. 459, 25 So. 63; *Johnson v. State* (1909) 57 Fla. 18, 49 So. 40; *Blocker v. State* (1924) 87 Fla. 128, 99 So. 250; *Chesser v. State* (1926) 92 Fla. 589, 109 So. 599, 906; *Blocker v. State* (1926) 92 Fla. 878, 110 So. 547.

GEORGIA

Defendant has the burden of proving insanity by a preponderance of evidence. *Carter v. State* (1876) 56 Ga. 463; *Danforth v. State* (1885) 75 Ga. 614; *Fogarty v. State* (1888) 80 Ga. 450, 5 S.E. 782; *Carr v. State* (1895) 96 Ga. 284, 22 S.E. 570; *Keener v. State* (1895) 97 Ga. 388, 23 S.E. 831; *Ryder v. State* (1897) 100 Ga. 528, 28 S.E. 246; *Minder v. State* (1901) 113 Ga. 772, 39 S.E. 284; *Allams v. State* (1905) 123 Ga. 500, 51 S.E. 506; *Polk v. State* (1918) 148 Ga. 34, 95 S.E. 988; *Bowden v. State* (1921) 151 Ga. 336, 106 S.E. 575; *Hinson v. State* (1921) 152 Ga. 243, 109 S.E. 661; *Currie v. State* (1922) 153 Ga. 178, 111 S.E. 727; *Goosby v. State* (1922) 153 Ga. 496, 112 S.E. 467.

This rule, however, would seem to be mitigated, if not actually contradicted, by the further rule that the evidence bearing on the question of insanity should be considered along with all of the evidence in the case, in determining whether there was a reasonable doubt of the guilt of the accused. *Carr v. State* (1895) 96 Ga. 284, 22 S.E. 570; *Ryder v. State* (1897) 100 Ga. 528, 28 S.E. 246; *Currie v. State* (1923) 156 Ga. 85, 118 S.E. 724.

This second rule has "greatly lightened, if not entirely removed," the burden of proof placed on the defendant by the first rule. *Wilson v. State* (1911) 9 Ga. App. 274, 70 S.E. 1128.

This conflict goes back at least to the case of *Westmoreland v. State* (1872) 45 Ga. 225. There, defendant requested an instruction that if

the jury have a reasonable doubt of sanity, they should acquit. This was not given, but the Supreme Court says this was no error, because the trial judge did charge all that defendant asked. "He charged that if the jury had a reasonable doubt of the prisoner's guilt, they should acquit. As he was clearly guilty, and so admitted by the line of defense adopted, unless he was insane, the charge was tantamount to telling the jury that, if they had a reasonable doubt of the prisoner's sanity, they should acquit."

Earlier cases held it was no error to instruct that defendant must prove insanity "to a reasonable certainty." *Minder v. State* (1901) 113 Ga. 772, 39 S.E. 284; *Bowden v. State* (1921) 151 Ga. 336, 106 S.E. 575. Nor was it error to instruct that insanity must be proved "to the reasonable satisfaction of the jury by a preponderance of the evidence." *Allams v. State* (1905) 123 Ga. 500, 51 S.E. 506.

The present rule, however, is that "to a reasonable certainty" is erroneous. *Polk v. State* (1918) 148 Ga. 34, 95 S.E. 988; *Currie v. State* (1922) 153 Ga. 178, 111 S.E. 727; *Goosby v. State* (1922) 153 Ga. 496, 112 S.E. 467.

The earliest case had said that defendant must prove insanity "clearly." *Choice v. State* (1860) 31 Ga. 424.

If defendant had been shown to be insane prior to the homicide, the presumption would be that he continued so, and the burden would be on the state to show to the reasonable satisfaction of the jury by a preponderance of the evidence that at the time of the act, he was sane. *Allams v. State* (1905) 123 Ga. 500, 51 S.E. 506. And see *Peek v. State* (1922) 155 Ga. 49, 116 S.E. 629.

IDAHO

Defendant has the burden in the first instance of raising a reasonable doubt of his sanity. But where such reasonable doubt is raised, the burden of proof shifts to the prosecution. *State v. Shuff* (1903) 9 Ida. 115, 72 Pac. 664; *State v. Wetter* (1905) 11 Ida. 433, 83 Pac. 341; *State v. Tharp* (1930) 48 Ida. 636, 284 Pac. 201.

The older cases had held that insanity is an affirmative defense and must be proved by defendant, by a preponderance of the evidence. *People v. Walter* (1871) 1 Ida. 386; *State v. Hurst* (1895) 4 Ida. 345, 39 Pac. 554; *State v. Larkins* (1897) 5 Ida. 200, 47 Pac. 945.

ILLINOIS

The presumption of sanity holds until evidence, coming from either side, is introduced, sufficient to raise a reasonable doubt of the defendant's sanity at the time of the act. When that occurs, the presumption of sanity ceases, and the prosecution has the burden of proving sanity, as a necessary element of the crime, beyond reasonable doubt. *Hopps v. People* (1863) 31 Ill. 385; *Chase v. People* (1866) 40 Ill. 352; *Dunn v. People* (1884) 109 Ill. 635; *Dacey v. People* (1886) 116 Ill. 555, 6 N.E. 165; *Langdon v. People* (1890) 133 Ill. 382, 24 N.E. 874; *Montag v. People* (1892) 141 Ill. 75, 30 N.E. 337; *Hornish v. People* (1892) 142 Ill. 620, 32 N.E. 677; *Jamison v. People* (1893) 145 Ill. 357, 34 N.E. 486; *Lilly v. People* (1894) 148 Ill. 467, 36 N.E. 95; *People v. Casey* (1907) 231 Ill. 261, 83 N.E. 278; *People v. Spencer* (1914) 264 Ill. 124, 106 N.E. 219; *People v. Ahrling* (1917) 279 Ill. 70, 116 N.E. 764; *People v. Haensel* (1920) 293 Ill. 33, 127 N.E. 181; *People v. Bacon* (1926) 293 Ill. 210, 127 N.E. 386; *People v. Geary* (1921) 297 Ill. 608, 131 N.E. 97; *People v. Krauser* (1925) 315 Ill. 485, 146 N.E. 593; *People v. Saylor* (1925) 319 Ill. 205, 149 N.E. 767; *People v. Ortiz* (1926) 320 Ill. 205, 150 N.E. 708; *People v. Christensen* (1929) 336 Ill. 251, 168 N.E. 292.

The "insanity" of which evidence must be produced in order to rebut the presumption of sanity does not mean any mental disorder, but such disorder as to render the person criminally irresponsible under the legal test of insanity. *Lilly v. People* (1894) 148 Ill. 467, 36 N.E. 95; *People v. Ortiz* (1926) 320 Ill. 205, 150 N.E. 708.

The reasonable doubt which rebuts the presumption of sanity, and which casts the burden of proving sanity upon the prosecution, may arise from evidence coming from either side. *Montag v. People* (1892) 141 Ill. 75, 30 N.E. 337; *People v. Spencer* (1914) 264 Ill. 124, 106 N.E. 219; *People v. Ahrling* (1917) 279 Ill. 70, 116 N.E. 764. The jury should acquit only if they have a reasonable doubt of guilt, after considering *all* the evidence, and not merely certain evidence, which, if taken alone, would raise such doubt. *Jamison v. People* (1893) 145 Ill. 357, 34 N.E. 486. Sanity is only one element going to make up guilt, so the jury should be instructed that they should acquit if they have a reasonable doubt of defendant's *guilt*, and not, if they have a

reasonable doubt of his *sanity*. *Hornish v. People* (1892) 142 Ill. 620, 32 N.E. 677. See also *People v. Bacon* (1920) 293 Ill. 210, 127 N.E. 386; *People v. Krauser* (1925) 315 Ill. 485, 146 N.E. 593. In some cases, however, it is said that if the jury has a reasonable doubt of the defendant's *sanity*, they must acquit. *Hopps v. People* (1863) 31 Ill. 385; *Chase v. People* (1866) 40 Ill. 352; *Lilly v. People* (1894) 148 Ill. 467, 36 N.E. 95; *Langdon v. People* (1890) 133 Ill. 382, 24 N.E. 874.

Some cases state that the presumption of sanity holds until the contrary "is shown" or "is made to appear." *People v. Bacon* (1920) 293 Ill. 210, 127 N.E. 386; *People v. Geary* (1921) 297 Ill. 608, 131 N.E. 97; *People v. Ortiz* (1926) 320 Ill. 205, 150 N.E. 708. However, this seems not to mean more than that a reasonable doubt must be raised. An instruction that the law presumes every person sane until the contrary is shown has been held erroneous. *People v. Saylor* (1925) 319 Ill. 205, 141 N.E. 767.

INDIANA

If there is a reasonable doubt of sanity, the jury must acquit. *Polk v. State* (1862) 19 Ind. 170; *Stevens v. State* (1869) 31 Ind. 485; *Bradley v. State* (1869) 31 Ind. 492; *Greenley v. State* (1877) 60 Ind. 141; *Guetig v. State* (1879) 66 Ind. 94; *McDougal v. State* (1882) 88 Ind. 24; *Sanders v. State* (1883) 94 Ind. 147; *Goodwin v. State* (1884) 96 Ind. 550; *Grubb v. State* (1888) 117 Ind. 277, 20 N.E. 725; *Plake v. State* (1889) 121 Ind. 433, 23 N.E. 273; *Plummer v. State* (1893) 135 Ind. 308, 34 N.E. 968; *Freese v. State* (1902) 159 Ind. 597, 65 N.E. 915; *Fritz v. State* (1912) 178 Ind. 463, 99 N.E. 727; *Walters v. State* (1915) 183 Ind. 178, 108 N.E. 583; *McHargue v. State* (1923) 193 Ind. 204, 139 N.E. 316.

The presumption of sanity holds only until a reasonable doubt has been cast upon it. In one case it was said the presumption holds until "some evidence" has been introduced to overthrow it. *Sanders v. State* (1883) 94 Ind. 157. But this seems inadvertent. It is not sufficient for defendant to introduce merely some evidence on the subject. There may be evidence tending to prove insanity, and yet not sufficiently strong to raise a reasonable doubt of mental unsoundness. *Guetig v. State* (1879) 66 Ind. 94; *Freese v. State* (1902) 159 Ind. 597, 65 N.E. 915.

The reasonable doubt entitling defendant to an acquittal may arise from the state's own evidence as well as that of the defense, and it is error to instruct the jury that "if the evidence *given by defendant*" is sufficient to raise a reasonable doubt, they must acquit. *McDougal v. State* (1882) 88 Ind. 24; *Walters v. State* (1915) 183 Ind. 178, 108 N.E. 583.

IOWA

The defendant has the burden of proving insanity by a preponderance of the evidence. *State v. Geddis* (1875) 42 Ia. 264; *State v. Bruce* (1878) 48 Ia. 530; *State v. Hemrick* (1883) 62 Ia. 414, 17 N.W. 594; *State v. Trout* (1888) 74 Ia. 545, 38 N.W. 405; *State v. Robbins* (1899) 109 Ia. 650, 80 N.W. 1061; *State v. Thiele* (1903) 119 Ia. 659, 94 N.W. 256; *State v. Humbles* (1905) 126 Ia. 462, 102 N.W. 409; *State v. Brandenberger* (1911) 151 Ia. 197, 130 N.W. 1065; *State v. Buck* (1928) 205 Ia. 1028, 219 N.W. 17.

An early leading case said the defendant has the burden of proving insanity by a "preponderance of proof or (which is the same) satisfactory evidence." *State v. Felter* (1871) 32 Ia. 49. Similarly in *State v. Humbles*, *supra*, it was held that an instruction that the jury must be "reasonably satisfied" was not erroneous. An instruction that the jury is not required to find insanity "unless the evidence clearly establishes such fact," has also been approved. *State v. Novak* (1899) 109 Ia. 717, 79 N.W. 465.

But it is better to omit such qualifying words as "clearly" establish or "fair" preponderance. *State v. Wegener* (1917) 180 Ia. 102, 162 N.W. 1040.

An instruction that proof of insanity must be "conclusive" is error, for this is equivalent to requiring proof beyond reasonable doubt. *State v. Brandenberger*, *supra*. It is error to instruct that evidence tending to show that insanity was "merely probable" is insufficient; "probable" means "having more evidence for than against," and that is sufficient. *State v. Jones* (1884) 64 Ia. 349, 20 N.W. 470.

KANSAS

Where the question of defendant's sanity is raised by the introduction of evidence tending to shake the presumption of sanity, the state

has the burden of proving sanity as part of its case, beyond reasonable doubt. *State v. Crawford* (1873) 11 Kans. 32; *State v. Mahn* (1881) 24 Kans. 182; *State v. Nixon* (1884) 32 Kans. 205, 4 Pac. 159; *State v. Johnson* (1914) 92 Kans. 441, 140 Pac. 839.

The question may be raised either by affirmative evidence introduced by defendant, or as a result of the state's evidence. *State v. Johnson, supra*.

KENTUCKY

If the jury "believe" from the evidence that the defendant is of unsound mind, as defined by the legal test, they should acquit. *Abbott v. Comm.* (1900) 107 Ky. 624, 55 S.W. 196; *Mathley v. Comm.* (1905) 120 Ky. 389, 86 S.W. 988; *Wilcox v. Comm.* (1910) 138 Ky. 846, 129 S.W. 309; *Banks v. Comm.* (1911) 145 Ky. 800, 141 S.W. 380; *Miracle v. Comm.* (1912) 148 Ky. 554, 146 S.W. 1121; *Hall v. Comm.* (1913) 155 Ky. 541, 159 S.W. 1155; *Cannon v. Comm.* (1932) 243 Ky. 302, 47 S.W. (2d) 1075.

Earlier cases had established that the burden of proving insanity rests on the defendant, but they were not in accord in wording the degree of proof necessary. It was definitely decided that the defendant need not prove this defense beyond reasonable doubt. *Ball v. Comm.* (1884) 81 Ky. 662. But some cases said the defendant had to "satisfy" the jury of his insanity. *Graham v. Comm.* (1855) 55 Ky. 587; *Brown v. Comm.* (1878) 77 Ky. 398; *Smith v. Comm.* (1891) 13 Ky. Law Rep. 612, 17 S.W. 868; *Hays v. Comm.* (1896) 17 Ky. Law Rep. 1147, 33 S.W. 1104; *Wright v. Comm.* (1903) 24 Ky. Law Rep. 1838, 72 S.W. 340. Others said he had to satisfy the jury by a preponderance of evidence. *Smith v. Comm.* (1864) 62 Ky. 224; *Kriel v. Comm.* (1869) 68 Ky. 362; *Cotrell v. Comm.* (1891) 13 Ky. Law Rep. 305, 17 S.W. 149. Still others seemed to hold a mere preponderance of proof sufficient. *Ball v. Comm.* (1884) 81 Ky. 662; *Moore v. Comm.* (1892) 92 Ky. 630, 18 S.W. 833; *Phelps v. Comm.* (1895) 17 Ky. Law Rep. 706, 32 S.W. 470.

The cases were reviewed in *Wilcox v. Comm.* (1910) 138 Ky. 846, 129 S.W. 309, and the conclusion reached that "neither the word 'satisfied' nor the words 'preponderance of the evidence' should be used in an insanity instruction," but the jury should simply be told

that if they believe beyond reasonable doubt that the defendant committed the act charged, "yet if they further believe from the evidence" that at the time he was of unsound mind, they should acquit.

Although followed in several cases, cited above, this rule seems to have been lost sight of in more recent decisions. Thus in one case, the court says that every person is presumed to be of sound mind until the contrary is shown "by a preponderance of the evidence." *Feree v. Comm.* (1922) 193 Ky. 347, 236 S.W. 246. And in another case, that the defendant "must satisfactorily show," that he is of unsound mind. *Arnold v. Comm.* (1922) 194 Ky. 421, 240 S.W. 87.

LOUISIANA

The defendant has the burden of proving insanity by a preponderance of evidence. *State v. Lyons* (1904) 113 La. 959, 37 So. 890; *State v. Johnston* (1907) 118 La. 276, 42 So. 935; *State v. Surrency* (1921) 148 La. 983, 88 So. 240; *State v. Toon* (1931) 172 La. 631, 135 So. 7.

The earlier cases had held that insanity must be "clearly" proved, "to the satisfaction of the jury." *State v. Burns* (1873) 25 La. Ann. 302; *State v. Coleman* (1875) 27 La. Ann. 691. Subsequent cases construed this to mean that defendant had to prove insanity beyond reasonable doubt. *State v. De Rance* (1882) 34 La. Ann. 186; *State v. Clements* (1895) 47 La. Ann. 1088, 17 So. 502.

However, in *State v. Scott* (1897) 49 La. Ann. 253, 21 So. 271, the *De Rance* case rule was overruled, the court holding that a preponderance of the evidence was all that was required, and that it would suffice if the jury were told that insanity must be established by "clear and convincing proof." This seems to imply that "clear and convincing proof" is not synonymous with "beyond reasonable doubt," but is synonymous with "preponderance of the evidence."

The more recent cases, however, seem to drop the use of such terms as "clear," "convincing," or "satisfactory," and state the rule to be simply that defendant must prove insanity by a preponderance of evidence.

The presumption of sanity and the presumption of innocence coming in conflict, the latter must give way. *State v. Lyons* (1904) 113 La. 959, 37 So. 890.

MAINE

The defendant has the burden of proving his insanity by a preponderance of the evidence. *State v. Lawrence* (1870) 57 Me. 574; *State v. Parks* (1899) 93 Me. 208, 44 Atl. 899.

The provision of the statute, Rev. Stat. (1930), chap. 149, §2, that if the jury acquits a person by reason of his *insanity*, they shall so state, etc., excludes the possibility that the jury should return such a verdict when they only have a doubt of his insanity. "It can hardly be supposed that the legislature expected or intended that the jury should return as a fact the insanity of the prisoner when they have only a reasonable doubt of his sanity." *State v. Lawrence, supra*.

MARYLAND

No cases.

MASSACHUSETTS

The state has the burden of proving sanity beyond reasonable doubt. *Comm. v. Heath* (1858) 77 Mass. 303; *Comm. v. Malone* (1873) 114 Mass. 295; *Comm. v. Johnson* (1905) 188 Mass. 382, 74 N.E. 939; *Comm. v. Spencer* (1912) 212 Mass. 438, 99 N.E. 266.

Early cases held that the defendant had the burden of proving his insanity to the satisfaction of the jury. *Comm. v. Rogers* (1844) 7 Metc. 500; *Comm. v. Eddy* (1856) 73 Mass. 583.

The presumption of sanity does not cease to function when evidence is introduced to show insanity, but the case is to be determined upon the whole evidence, "including the presumption of sanity." *Comm. v. Spencer, supra*.

MICHIGAN

When evidence of insanity is introduced, creating a reasonable doubt of insanity, the state has the burden of proving sanity beyond a reasonable doubt. *People v. Garbutt* (1868) 17 Mich. 9; *People v. Finley* (1878) 38 Mich. 482; *People v. Eggleston* (1915) 186 Mich. 510, 152 N.W. 944.

Although the *Garbutt* case had said that "when any evidence is given which tends to overthrow the presumption," then the state must prove sanity beyond a reasonable doubt, yet this seems inad-

vertent language. In the Finley case, the court said, "It is only when the testimony creates a reasonable doubt that there is any occasion to remove the doubt." Until such reasonable doubt is created, the state can rest on the presumption of sanity.

MINNESOTA

The defendant has the burden of rebutting the presumption of sanity (evidently by preponderating evidence). *Bonfanti v. State* (1858) 2 Minn. 123; *State v. Brown* (1867) 12 Minn. 538; *State v. Gut* (1868) 13 Minn. 341; *State v. Hanley* (1886) 34 Minn. 430, 26 N.W. 397.

An instruction that insanity must be proved "by a fair preponderance of the evidence" has been approved. *State v. Gear* (1882) 29 Minn. 221, 13 N.W. 140.

This rule is perhaps required by the statute providing that "every person is presumed to be responsible for his acts, and the burden of rebutting such presumption is upon him." Stat. (1927), §9913.

The statutory provision that where the defense is insanity, "the jury must be instructed if they acquit him on that ground, to state that fact in their verdict," has been construed to mean that the jury is only to acquit on the ground of *insanity*, but not on the ground of a mere reasonable *doubt* of insanity. *Bonfanti v. State*, *supra*.

MISSISSIPPI

"The true rule" as to burden of proof of insanity is that "every man is presumed to be sane, and in the absence of testimony engendering a reasonable doubt of sanity, no evidence on the subject need be offered; but whenever the question of sanity is raised and put in issue by such facts, proven on either side, as engender such doubt, it devolves upon the State to remove it, and to establish the sanity of the prisoner to the satisfaction of the jury, beyond all reasonable doubt arising out of all the evidence in the case." *Cunningham v. State* (1879) 56 Miss. 269; *Ford v. State* (1896) 73 Miss. 734, 19 So. 665, 35 L.R.A. 117.

The earliest case on the subject had said that the presumption of sanity holds until the contrary is clearly proved, and that a mere

probability of insanity cannot prevail over this presumption. *Newcomb v. State* (1859) 37 Miss. 383, 2 Morris St. Cases 1303, 1325.

In *Russell v. State* (1876) 53 Miss. 367, the trial court charged the jury in one instruction that sanity must be proved by the state beyond reasonable doubt, and in another that if insanity was established by a preponderance of the evidence they should acquit. The Supreme Court said that the defendant had no cause to complain.

The subject was fully discussed in the *Cunningham* case, and the rule quoted above laid down as the law in Mississippi.

MISSOURI

The burden is on the defendant to prove insanity to the reasonable satisfaction of the jury by the weight and preponderance of the evidence. *State v. Klinger* (1868) 43 Mo. 127; *State v. Hundley* (1870) 46 Mo. 414; *State v. Smith* (1873) 53 Mo. 270; *State v. Redemeier* (1879) 71 Mo. 173; *State v. Erb* (1881) 74 Mo. 199; *State v. Schaefer* (1893) 116 Mo. 96, 22 S.W. 447; *State v. Wright* (1896) 134 Mo. 404, 35 S.W. 1145; *State v. Lewis* (1896) 136 Mo. 84, 37 S.W. 806; *State v. Bell* (1896) 136 Mo. 120, 37 S.W. 823; *State v. Duestrow* (1896) 137 Mo. 44, 38 S.W. 554; *State v. Privitt* (1903) 175 Mo. 207, 75 S.W. 457; *State v. Church* (1906) 199 Mo. 605, 98 S.W. 16; *State v. Porter* (1908) 213 Mo. 45, 111 S.W. 529; *State v. Barker* (1908) 216 Mo. 532, 115 S.W. 1102; *State v. Douglas* (1925) 312 Mo. 373, 278 S.W. 1016.

An instruction that the defendant must prove insanity by a *clear* preponderance of the evidence has been held error. *State v. Hundley* (1870) 46 Mo. 414.

In a prior case, however, it was said that the defendant must prove insanity to the *entire* satisfaction of the jury. *State v. McCoy* (1864) 34 Mo. 531.

An exception to the general rule as to burden of proof has been said to exist in cases where chronic insanity has been shown to have existed some time before the crime. In such cases, it will be presumed that the insanity continued to exist, and the burden of proving a subsequent lucid interval, at the time of the crime, lies on the state. *State v. Lowe* (1887) 93 Mo. 547, 5 S.W. 889. This doctrine is difficult to apply. While the Supreme Court has never questioned its correctness

in a proper case, it has never yet found a proper case. *State v. Schaefer* (1893) 116 Mo. 96, 22 S.W. 447; *State v. Bobbst* (1916) 269 Mo. 214, 190 S.W. 257.

MONTANA

By an amendment to the Penal Code, added in 1925, it was provided that, "when the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven by the defendant by a preponderance of the testimony." *Laws* (1925), chap. 87; *State v. Vetter* (1926) 76 Mont. 574; *State v. De Haan* (1930) 88 Mont. 407, 292 Pac. 1109.

Before the legislature had enacted this rule, the courts had held that defendant need raise only a reasonable doubt of his sanity, and that the state thereupon had the burden of proving sanity. *State v. Brooks* (1899) 23 Mont. 146, 57 Pac. 1038; *State v. Crowe* (1909) 39 Mont. 174, 102 Pac. 579; *State v. Sheldon* (1917) 54 Mont. 185, 169 Pac. 37; *State v. Colbert* (1920) 58 Mont. 584, 194 Pac. 145.

NEBRASKA

The presumption of sanity relieves the prosecution of proving sanity until evidence of insanity is introduced. But when *any* evidence is introduced tending to show that at the time of the act the defendant was not in such mental condition as to be legally responsible, then the burden is on the state to prove beyond reasonable doubt all the elements necessary for guilt, including the required mental condition. *Wright v. People* (1876) 4 Neb. 407; *Furst v. State* (1891) 31 Neb. 403, 47 N.W. 1116; *Snider v. State* (1898) 56 Neb. 309, 76 N.W. 574; *Knights v. State* (1899) 58 Neb. 225, 78 N.W. 508; *Hamblin v. State* (1908) 81 Neb. 148, 115 N.W. 850; *Davis v. State* (1911) 90 Neb. 361, 133 N.W. 406; *Prince v. State* (1912) 92 Neb. 490, 138 N.W. 726; *Shellenberger v. State* (1916) 99 Neb. 370, 156 N.W. 777; *Muzik v. State* (1916) 99 Neb. 496, 156 N.W. 1056; *Maddox v. State* (1922) 108 Neb. 809, 189 N.W. 398; *Shannon v. State* (1923) 111 Neb. 457; *Williams v. State* (1927) 115 Neb. 277, 212 N.W. 606; *Torske v. State* (1932) 123 Neb. 161, 242 N.W. 408.

An instruction that "if there is evidence in the case . . . *sufficient to raise a reasonable doubt* on the issue of insanity, then the burden

of proof is upon the state," etc., was held error. The defendant is not required to introduce sufficient evidence to raise a reasonable doubt. The presumption of sanity holds only in the absence of evidence; but as soon as *any* evidence is introduced, the state must convince the jury of sanity. *Snider v. State* (1898) 56 Neb. 309, 76 N.W. 574; *Torske v. State* (1932) 123 Neb. 161, 242 N.W. 408.

The presumption of sanity holds only until evidence is introduced, *whether by the state or by the defense*, tending to weaken or impair that presumption. *Davis v. State* (1911) 90 Neb. 361, 133 N.W. 406.

NEVADA

The burden is on the defendant to show by a preponderance of the evidence that he is insane. *State v. Lewis* (1889) 20 Nev. 333, 22 Pac. 241; *State v. Hartley* (1895) 22 Nev. 342, 40 Pac. 372; *State v. Nelson* (1913) 36 Nev. 403, 136 Pac. 377; *State v. Clancy* (1915) 38 Nev. 181, 147 Pac. 449.

NEW HAMPSHIRE

The state has the burden of proving sanity beyond a reasonable doubt. *State v. Bartlett* (1861) 43 N.H. 224; *State v. Jones* (1871) 50 N.H. 369.

NEW JERSEY

The defendant has the burden of proving insanity to the satisfaction of the jury, by a preponderance of proof. *Graves v. State* (1883) 45 N.J.L. 203; *Genz v. State* (1896) 58 N.J.L. 482, 34 Atl. 816; *State v. Herron* (1908) 77 N.J.L. 523, 71 Atl. 274; *State v. Overton* (1913) 85 N.J.L. 287, 88 Atl. 689; *State v. Kudzinowski* (1929) 106 N.J.L. 155, 147 Atl. 453; *State v. George* (1932) 108 N.J.L. 508, 158 Atl. 509.

No distinction is made between evidence "satisfactory to the jury" and a mere "preponderance of evidence." Both forms are usually given, in wording similar to that above.

The earliest case, *State v. Spencer* (1846) 21 N.J.L. 196, held that the defendant had to prove insanity beyond a reasonable doubt. In *Graves v. State*, *supra*, the *Spencer* case was cited, the trial court saying that for fifty years the rule has been "clear and certain" in New Jersey, that the defendant must prove insanity by "a clear preponderance of proof." The Court of Errors and Appeals affirmed this, saying that

the defense must be proved "to the satisfaction of the jury, and it must be established by the preponderance of proof; in other words, it must be sustained by the evidence." In *State v. George*, *supra*, it was said that this defense must be proved to the satisfaction of the jury, and may be established by preponderance of proof.

It is error to instruct the jury that the defendant must prove insanity "by a clear preponderance of proof and by the most satisfactory evidence," for preponderance of proof is all that is required "and that preponderance may be shown by evidence that is not the most satisfactory." *Mahon v. State* (1897) 20 N.J.L. J. 146.

A reasonable doubt of insanity is not sufficient to justify an acquittal. *State v. Herron* (1908) 77 N.J.L. 523, 71 Atl. 274.

NEW MEXICO

The presumption of sanity casts upon the defendant the burden of producing evidence sufficient to create a reasonable doubt of his sanity. However, he need not prove insanity, either beyond reasonable doubt or even by a preponderance of the evidence. *Faulkner v. Territory* (1892) 6 N. Mex. 464, 30 Pac. 905; *Territory v. McNabb* (1911) 16 N. Mex. 625, 120 Pac. 907.

NEW YORK

Mental responsibility being a necessary element of crime, the affirmative of the question of sanity rests on the state. But sanity being the normal condition of mankind, the prosecution can rest upon that presumption in the first instance. The burden of overthrowing the presumption and of showing insanity is upon the defendant, but "if evidence is given tending to establish insanity," then on the general question of responsibility, the prosecution must prove sanity beyond reasonable doubt. *Brotherton v. People* (1878) 75 N.Y. 159; *O'Connell v. People* (1882) 87 N.Y. 377; *Walker v. People* (1882) 88 N.Y. 81; *People v. Taylor* (1893) 138 N.Y. 398, 34 N.E. 275; *People v. Egnor* (1903) 175 N.Y. 419, 67 N.E. 906; *People v. Tobin* (1903) 176 N.Y. 278, 68 N.E. 359; *People v. Carlin* (1909) 194 N.Y. 448, 87 N.E. 805.

This rule is the result of a long process of evolution. The earliest cases held that insanity was an affirmative defense, to be proved be-

yond all reasonable doubt. *Sellick's Case* (1816) 1 City Hall Rec. 185; *People v. Sprague* (1849) 2 Park Crim. 43.

Later, the rule was liberalized, so as to permit the defendant to establish this defense by a preponderance of evidence. *People v. McCann* (1857) 16 N.Y. 58; *People v. Schruyver* (1870) 52 N.Y. 467.

Still later, the rule was changed so as to put the ultimate burden of proof on the prosecution, but it was held that the prosecution could establish sanity by a mere preponderance of evidence. *People v. Nino* (1896) 149 N.Y. 317, 43 N.E. 853; *People v. Barberi* (1896) 12 N.Y. Crim. 89, 47 N.Y. Supp. 168.

Later it was held that the correct rule was that sanity must be proved beyond reasonable doubt, and that the last mentioned cases were either to be understood as so holding, or else were erroneous. *People v. Egnor* (1903) 175 N.Y. 419, 67 N.E. 906.

NORTH CAROLINA

The defendant has the burden of proving insanity to the satisfaction of the jury. *State v. Starling* (1859) 51 N.C. 366; *State v. Payne* (1882) 86 N.C. 609; *State v. Potts* (1888) 100 N.C. 457, 6 S.E. 657; *State v. Hancock* (1909) 151 N.C. 698, 66 S.E. 128; *State v. Terry* (1917) 173 N.C. 761, 92 S.E. 154; *State v. Jones* (1926) 191 N.C. 753, 133 S.E. 81; *State v. Walker* (1927) 193 N.C. 489, 137 S.E. 429.

A charge that the defendant must prove insanity by a preponderance of the evidence was held to be more favorable than defendant deserved, for proof may be preponderating, and yet fail to satisfy the jury. *State v. Payne, supra*.

NORTH DAKOTA

No cases. A statute provides that lunatics are incapable of committing crime "upon proof" that they did not know the wrongfulness of the act. *Quære* whether this puts the burden of proving such condition upon defendant. Comp. Laws (1913), §9207.

OHIO

The defendant has the burden of proving insanity by a preponderance of evidence. *Loeffner v. State* (1858) 10 Ohio 599; *Bond v. State*

(1872) 23 Ohio 349; *Bergin v. State* (1876) 31 Ohio 111; *Kelch v. State* (1896) 55 Ohio 146, 45 N.E. 6; *State v. Austin* (1904) 71 Ohio 317, 73 N.E. 218; *State v. Hauser* (1920) 101 Ohio 404, 131 N.E. 66; *Rehfeld v. State* (1921) 102 Ohio 431, 131 N.E. 712; *Long v. State* (1923) 109 Ohio 77, 141 N.E. 691.

An early case charged the jury that defendant must prove insanity to the *satisfaction* of the jury, "by clear or circumstantial proof." *Clark v. State* (1843) 12 Ohio R. 483. See also *Farrer v. State* (1853) 2 Ohio 54.

OKLAHOMA

The presumption of sanity holds until evidence is introduced, by either side, sufficient to raise a reasonable doubt of defendant's sanity at the time of the act. Thereupon, the burden is on the state to prove sanity beyond reasonable doubt. *Maas v. Terr.* (1901) 10 Okla. 714, 63 Pac. 960; *Adair v. State* (1911) 6 Okla. Crim. 284, 188 Pac. 416; *Alberty v. State* (1914) 10 Okla. Crim. 616, 140 Pac. 1025; *Smith v. State* (1916) 12 Okla. Crim. 307, 155 Pac. 699; *Snodgrass v. State* (1918) 15 Okla. Crim. 117, 175 Pac. 129; *Hodges v. State* (1919) 16 Okla. Crim. 183, 182 Pac. 260; *Adams v. State* (1928) 40 Okla. Crim. 44; *Adams v. State* (1930) — Okla. Crim. —, 292 Pac. 385.

The defendant does not rebut the presumption of sanity by merely introducing *some* proof of insanity; the evidence of insanity must be sufficient to raise a reasonable doubt. *Maas v. Terr., supra.*

OREGON

The rule is established by statute in Oregon that "when the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond reasonable doubt." The burden of proof always remains with defendant. Code (1930), §13-922; *State v. Murray* (1884) 11 Ore. 413, 5 Pac. 55; *State v. Hansen* (1894) 25 Ore. 391, 35 Pac. 976, 36 Pac. 296; *State v. Branton* (1899) 33 Ore. 533, 56 Pac. 267; *State v. Butchek* (1927) 121 Ore. 141, 253 Pac. 367, 254 Pac. 805; *State v. Grayson* (1928) 126 Ore. 560, 270 Pac. 404.

"The law presumes every man to be sane until he establishes his insanity beyond a reasonable doubt." *State v. Butchek, supra.*

PENNSYLVANIA

The defendant has the burden of proving insanity by fairly preponderating evidence. *Coyle v. Comm.* (1882) 100 Pa. 573; *Comm. v. Gerade* (1891) 145 Pa. 289, 22 Atl. 464; *Comm. v. Woodley* (1895) 166 Pa. 463, 31 Atl. 302; *Comm. v. Bezek* (1895) 168 Pa. 603, 32 Atl. 109; *Comm. v. Wireback* (1899) 190 Pa. 138, 42 Atl. 542; *Comm. v. Heidler* (1899) 191 Pa. 375, 43 Atl. 211; *Comm. v. Barner* (1901) 199 Pa. 335, 49 Atl. 60; *Comm. v. Lee* (1910) 226 Pa. 283, 75 Atl. 411; *Comm. v. Molten* (1911) 230 Pa. 399, 79 Atl. 638; *Comm. v. Dale* (1919) 264 Pa. 362, 107 Atl. 743; *Comm. v. Tompkins* (1920) 267 Pa. 541, 110 Atl. 275; *Comm. v. Bryson* (1923) 276 Pa. 566, 120 Atl. 552.

The earlier cases held that the defendant had the burden of "satisfying" the jury of his insanity. *Lynch v. Comm.* (1874) 77 Pa. 205; *Ortwein v. Comm.* (1874) 76 Pa. 414.

Then a few cases said the evidence must be "satisfactory—such as flows from a preponderance of the evidence." *Meyers v. Comm.* (1876) 83 Pa. 131. Or "satisfactory and fairly preponderating." *Pannell v. Comm.* (1878) 86 Pa. 260.

That defendant has the burden of "satisfying" the jury of insanity still seems to be a correct statement of the law, and instructions to that effect have been approved. *Comm. v. Washington* (1902) 202 Pa. 148, 51 Atl. 759; *Comm. v. Kilpatrick* (1902) 204 Pa. 218, 53 Atl. 774; *Comm. v. Calhoun* (1913) 238 Pa. 474, 86 Atl. 472; *Comm. v. Wheeler* (1914) 246 Pa. 528, 92 Atl. 718.

It is error to instruct the jury that the defendant has the burden of proving insanity beyond reasonable doubt. *Meyers v. Comm.* (1876) 83 Pa. 131. Or that jury must be *fully* satisfied. *Comm. v. Lee* (1910) 226 Pa. 283, 75 Atl. 411. Or that the jury must be satisfied by *conclusive* evidence. *Pannell v. Comm.* (1878) 86 Pa. 260. Or by *clearly* preponderating evidence. *Coyle v. Comm.* (1882) 100 Pa. 573; *Comm. v. Molten* (1911) 230 Pa. 399, 79 Atl. 638.

However, an instruction that insanity must be proved by "clearly preponderating" evidence is not reversible error, when it continues, "although he is not required to establish that fact beyond a reasonable doubt." The only reason why phrases like "clearly" and "fully" are erroneous, is that they must be construed to mean that the defendant

must prove insanity beyond reasonable doubt; where that construction is denied by the instruction itself, there is no error. *Comm. v. Scovern* (1928) 292 Pa. 26, 140 Atl. 611.

Evidence of insanity set up in defense of one charged with a crime must be preponderating when weighed against the presumption of sanity and the evidence of the commonwealth in support of it. *Comm. v. Lee* (1911) 233 Pa. 16, 81 Atl. 812.

Although, as stated above, the rule is laid down to be that the defendant need prove insanity only by a fair preponderance of the evidence, nevertheless, where the defense relied on is irresistible impulse, or "homicidal mania," the existence of such disorder is required to be shown by *clear* proof. *Comm. v. Mosler* (1846) 4 Pa. 264; *Coyle v. Comm.* (1882) 100 Pa. 573; *Comm. v. Calhoun* (1913) 238 Pa. 474, 86 Atl. 472; *Comm. v. Cavalier* (1925) 284 Pa. 311, 131 Atl. 229. A more recent case seems to state that irresistible impulse is not recognized at all as a defense to crime. *Comm. v. Schroeder* (1931) 302 Pa. 1, 152 Atl. 835. See p. 138.

RHODE ISLAND

The defendant has the burden of proving insanity by a fair preponderance of the evidence. *State v. Quigley* (1904) 26 R.I. 263, 58 Atl. 905; *State v. Fenik* (1923) 45 R.I. 309, 121 Atl. 218.

SOUTH CAROLINA

The defendant has the burden of proving insanity by a preponderance of the evidence, but if, upon the whole case, the jury has a reasonable doubt, they must acquit. *State v. Paulk* (1882) 18 S.C. 514; *State v. Coleman* (1883) 20 S.C. 442; *State v. Bundy* (1885) 24 S.C. 439; *State v. Alexander* (1888) 30 S.C. 74, 8 S.E. 440; *State v. McIntosh* (1893) 39 S.C. 97, 17 S.E. 446.

While the rule is not wholly clear, it seems to be that all the defendant need do is to raise a reasonable doubt of the state's case, but the quantum of evidence necessary to raise a reasonable doubt of insanity, is a preponderance. "When the state fully proves a *prima facie* case, and a special defense, such as insanity, alibi, etc., is interposed, it must be established only by such a preponderance of evi-

dence as will satisfy the jury that the charge is not sustained 'beyond all reasonable doubt.' " *State v. Paulk, supra*; *State v. Bundy, supra*.

SOUTH DAKOTA

No cases.

TENNESSEE

The defendant has the burden of going forward; the presumption of sanity being sufficient in the first instance. But if on all the proof, the jury have a reasonable doubt of the defendant's sanity at the time of the act, he is entitled to an acquittal. *Dove v. State* (1872) 50 Tenn. 348; *Stuart v. State* (1873) 60 Tenn. 178; *Green v. State* (1889) 88 Tenn. 614, 14 S.W. 430; *King v. State* (1892) 91 Tenn. 617, 20 S.W. 169.

In the Supreme Court, however, the jury having found the defendant not insane, and the trial judge having refused a new trial, the burden is on the defendant to show his insanity by a preponderance of the evidence. *Spence v. State* (1885) 83 Tenn. 539; *Watson v. State* (1915) 133 Tenn. 198, 180 S.W. 168.

TEXAS

The defendant has the burden of proving his sanity by a preponderance of the evidence. *Fisher v. State* (1891) 30 Tex. Crim. 502, 18 S.W. 90; *Lovegrove v. State* (1893) 31 Tex. Crim. 491, 21 S.W. 191; *Boren v. State* (1894) 32 Tex. Crim. 637, 25 S.W. 784; *McCulloch v. State* (1906) 50 Tex. Crim. 132, 94 S.W. 1056; *Smith v. State* (1909) 55 Tex. Crim. 563, 117 S.W. 966; *Roberts v. State* (1912) 67 Tex. Crim. 580, 150 S.W. 627; *Kirby v. State* (1912) 68 Tex. Crim. 63, 150 S.W. 455; *Graham v. State* (1914) 73 Tex. Crim. 28, 163 S.W. 726; *Douglas v. State* (1914) 73 Tex. Crim. 385, 165 S.W. 933; *Burgess v. State* (1916) 78 Tex. Crim. 469, 181 S.W. 465; *Mikeska v. State* (1916) 79 Tex. Crim. 109, 182 S.W. 1127; *Perea v. State* (1921) 88 Tex. Crim. 382, 227 S.W. 305; *Gardener v. State* (1921) 90 Tex. Crim. 339, 235 S.W. 897; *Sagu v. State* (1923) 94 Tex. Crim. 14, 248 S.W. 390; *Cardena v. State* (1923) 94 Tex. Crim. 436, 251 S.W. 225; *Newman v. State* (1924) 99 Tex. Crim. 363, 269 S.W. 440; *Thompson v. State* (1926) 104 Tex. Crim. 637, 285 S.W. 826; *Snow v. State* (1927) 106

Tex. Crim. 222, 291 S.W. 558; *Davidson v. State* (1928) 109 Tex. Crim. 251, 4 S.W. (2d) 74.

The earliest cases said that the defense of insanity must be "clearly" proved, "to the satisfaction of the jury," by "undoubted evidence," etc. *Carter v. State* (1854) 12 Tex. 500; *Webb v. State* (1879) 5 Tex. App. 596; *Clark v. State* (1880) 8 Tex. App. 350.

In these cases, the matter was not actually in controversy, however. In *Webb v. State* (1880) 9 Tex. App. 490, the rule was adopted that "the evidence of insanity, to warrant an acquittal, should be sufficiently clear to convince the minds and conscience of the jury." This rule was followed in four later cases. *King v. State* (1880) 9 Tex. App. 515; *King v. State* (1882) 13 Tex. App. 277; *Mendiola v. State* (1885) 18 Tex. App. 462; *Smith v. State* (1885) 19 Tex. App. 95.

More recent cases require only a preponderance of evidence as stated above. Nevertheless, instructions that insanity must be "clearly established" have been approved, as not inconsistent with this rule. *Smith v. State* (1885) 19 Tex. App. 95; *Giebel v. State* (1889) 28 Tex. App. 151, 12 S.W. 591; *Hurst v. State* (1899) 40 Tex. Crim. 378, 46 S.W. 635, 50 S.W. 719; *Carlisle v. State* (1900) 56 S.W. 365; *Nugent v. State* (1904) 46 Tex. Crim. 67, 80 S.W. 84; *Thomas v. State* (1909) 55 Tex. Crim. 293, 116 S.W. 600; *Hartman v. State* (1919) 85 Tex. Crim. 582, 213 S.W. 936. However, in some of these cases, the court added that where such instructions are given, requiring the defendant to "clearly" prove his insanity, the court should explain that this does not mean that he must prove his insanity beyond a reasonable doubt. *Hurst v. State*, *supra*; *Stanfield v. State* (1906) 50 Tex. Crim. 69, 94 S.W. 1057; *McCulloch v. State* (1906) 50 Tex. Crim. 132, 94 S.W. 1056.

In *Wilson v. State* (1910) 58 Tex. Crim. 596, 127 S.W. 548, the Court of Criminal Appeals itself said the defense "must be clearly proved and by a preponderance of evidence." But in the great majority of cases, cited above, the rule is stated to be that insanity must be proved by a preponderance of evidence.

Although the general rule is that the defendant has the burden of proving his insanity, yet the Texas court has adopted the rule that where it is shown that the defendant has at some prior time been adjudicated insane (or perhaps otherwise proved to have been perma-

nently insane), such prior insanity is presumed to continue and the burden is then shifted to the state to prove sanity beyond a reasonable doubt. For the evolution of this rule, see: *Webb v. State* (1879) 5 Tex. App. 596; *Leache v. State* (1886) 22 Tex. App. 279; *Hunt v. State* (1894) 33 Tex. Crim. 252, 26 S.W. 206; *Wisdom v. State* (1901) 42 Tex. Crim. 579, 61 S.W. 926; *Sims v. State* (1907) 50 Tex. Crim. 563, 99 S.W. 555; *Wooten v. State* (1907) 51 Tex. Crim. 428, 102 S.W. 416; *Morse v. State* (1913) 68 Tex. Crim. 351, 152 S.W. 927; *Witty v. State* (1913) 69 Tex. Crim. 125, 153 S.W. 1146; *Welch v. State* (1913) 71 Tex. Crim. 17, 157 S.W. 946; *Graham v. State* (1914) 73 Tex. Crim. 28, 163 S.W. 726; *Douglas v. State* (1914) 73 Tex. Crim. 385, 165 S.W. 933; *Holland v. State* (1918) 84 Tex. Crim. 144, 206 S.W. 88; *Yantis v. State* (1923) 95 Tex. Crim. 541, 255 S.W. 180; *Francks v. State* (1928) 109 Tex. Crim. 440, 5 S.W. (2d) 157.

It is not clear whether this rule applies only in the case of a prior adjudication of insanity, or also upon insanity at a prior time proved in some other way. One case seems to limit the rule to the case where the defendant had at some previous time been adjudged insane. *Graham v. State* (1914) 73 Tex. Crim. 28, 163 S.W. 726. Others seem to extend it to all cases in which prior insanity is admitted or proved to have existed. *Sims v. State* (1906) 50 Tex. Crim. 563, 99 S.W. 555; *Wooten v. State* (1907) 51 Tex. Crim. 428, 102 S.W. 416; *Morse v. State* (1913) 68 Tex. Crim. 351, 152 S.W. 927; *Douglas v. State* (1914) 73 Tex. Crim. 385, 165 S.W. 933; *Holland v. State* (1918) 84 Tex. Crim. 144, 206 S.W. 88.

"Wherever insanity has been shown by a judgment of the County Court in an inquisition or of *de lunatico inquirendo* the presumption is that he is insane at the time set out or covered by the verdict of the jury if it overreaches and goes back in its finding as to the length of time the party has been insane, and it is equally the rule, that the presumption of insanity obtains from that time forward. The introduction of this evidence then would cast the burden upon the state to show that he was sane at the time of the homicide." *Witty v. State* (1913) 69 Tex. Crim. 125, 153 S.W. 1146.

However, where the defendant was adjudged insane after the act, but had recovered by the time of the trial, and where there was noth-

ling to show that at the insanity hearing there was any evidence or finding that his insanity covered the period when he is alleged to have committed this crime, the rule of the Witty case does not apply, and the court is correct in charging that the burden is on the defendant to show by a preponderance of evidence that he was unsound at the time of the commission of the crime. *Welch v. State* (1913) 71 Tex. Crim. 17, 157 S.W. 946.

The rule also does not apply where there are lucid intervals. In such a case, the defendant must show that the criminal act was not committed during such a lucid interval, for the presumption is, where there are lucid intervals, that the act was committed during such a lucid interval. *Gray v. State* (1924) 99 Tex. Crim. 305, 268 S.W. 941; *Trahan v. State* (1931) 35 S.W. (2d) 169.

The general rule that the defendant must prove insanity by a preponderance of evidence also does not apply in the case where it is claimed the insanity resulted from blows inflicted by the deceased, the deceased being the aggressor. "If deceased himself, by his aggression, and on account of his assault, dazed appellant, rendering him unconscious and incapable of understanding and knowing the right and wrong of his actions, this condition springs out of and inheres in the case; and appellant was entitled to a reasonable doubt on the subject." *Dent v. State* (1904) 46 Tex. Crim. 166, 79 S.W. 525.

UTAH

The defendant has the burden, in the first instance, of producing evidence of insanity, but if he produces enough evidence to raise a reasonable doubt, the ultimate burden of proving sanity rests on the state. *State v. Brown* (1909) 36 Utah 46, 102 Pac. 641; *State v. Mcwhinney* (1913) 43 Utah 135, 134 Pac. 632; *State v. Cerar* (1922) 60 Utah 208, 207 Pac. 597; *State v. Hadley* (1925) 65 Utah 109, 234 Pac. 940; *State v. Green* (1931) 78 Utah 580, 6 Pac. (2d) 177.

The early cases held that insanity was an affirmative defense, which was included within the meaning of the statute providing that the commission of the homicide being proved, the burden of proving "circumstances of mitigation or that justify or excuse it, devolves

charged as from the evidence of the defense. *Duthey v. State* (1907) 131 Wis. 178, 111 N.W. 222.

"The rule of law that there is a presumption of sanity goes little, if any, further than to constitute a rule of practice to the effect that, in the absence of any evidence bearing on the subject, there is no issue to be submitted to the jury. It is a rule important to the courts, but the communication of which to the jury is of doubtful propriety." *Duthey v. State*, *supra*.

There is also a presumption that insanity once proved to exist continues until the presumption is overcome by contrary and repelling evidence, and the refusal of the court so to instruct the jury has been held reversible error. *State v. Wilner* (1876) 40 Wis. 304. This presumption of continuance does not apply to cases of occasional or intermittent insanity, however, but does apply to all cases of habitual or apparently confirmed insanity. *State v. Wilner*, *supra*.

By statute, the presumption of continuance of insanity, arising from a prior adjudication, ceases two years after the patient's discharge from the asylum without being recalled. *Hempton v. State* (1901) 111 Wis. 127, 86 N.W. 596.

WYOMING

When the question of insanity is in issue, and there is evidence tending to prove insanity, the burden is on the state to prove the sanity of the defendant beyond reasonable doubt. *Gustavenson v. State* (1902) 10 Wyo. 300, 68 Pac. 1006; *Pressler v. State* (1907) 16 Wyo. 214, 92 Pac. 806; *Flanders v. State* (1916) 24 Wyo. 81, 156 Pac. 1121; *Cirej v. State* (1916) 24 Wyo. 507, 161 Pac. 556.

CHAPTER V

WITNESSES AND THEIR TESTIMONY

NOTE: In general, the rules of evidence applicable in criminal trials where insanity is a defense are the same as in any other criminal or civil trial. In this chapter, particular consideration is given to questions of evidence which may arise in criminal cases involving insanity as a defense, and only cases of that nature are cited.

§1. EXPERT TESTIMONY

Qualifications of Experts. The rules concerning the qualifications required of expert witnesses and what they may testify to, are the same in criminal as in civil cases, and so are here reviewed only briefly. In general, any person who is able to give the jury appreciable help upon a subject in which special knowledge is necessary or helpful in arriving at a correct inference from the facts proved, is qualified to testify as an expert on that subject.¹ Just how much skill, knowledge, and experience a witness must have in order to qualify as an expert cannot be determined by any general rule,² and the competency of each particular witness is a matter resting in the sound discretion of the

¹ "Any witness, otherwise qualified, who, by study or experience (but not by observation alone), is shown to have acquired and to possess special skill, knowledge or learning upon the subject under investigation, such as is not commonly had by men in the ordinary walks of life, and which will aid and is necessary to aid the jury in the particular matter under investigation, is competent to testify as an expert upon that topic." *State v. Liolios* (1920) 285 Mo. 1, 225 S.W. 941. And see Wigmore, *Evid.* (2d ed., 1923), vol. iv, §1923.

² *Green v. State* (1898) 64 Ark. 523, 43 S.W. 973; *Davis v. State* (1902) 44 Fla. 32, 32 So. 822; *People v. Lowhone* (1920) 292 Ill. 32, 126 N.E. 620; *State v. Smith* (1902) 106 La. 33, 30 So. 248; *Comm. v. Johnson* (1905) 188 Mass. 382, 74 N.E. 939; *Braunie v. State* (1920) 105 Neb. 355, 180 N.W. 567; *Comm. v. Cavalier* (1925) 284 Pa. 311, 131 Atl. 229; *Matheson v. U.S.* (1912) 227 U.S. 540, 33 Sup. Ct. 355.

trial court.³ The exercise of this discretion will not be overturned by the upper court, except for clear abuse.⁴

In cases where mental condition is an issue, trial courts in practice usually admit as an expert any practicing, licensed physician, and upper courts have sometimes expressly stated that physicians in general practice may testify as experts on insanity.⁵ The fact that the physician disclaims being an expert is immaterial, his competence being a matter for the court, and not himself, to decide.⁶ However, there is no requirement that the witness offered as an expert must be a physician.⁷ If the person is really an expert in the subject, it seems he may testify to his opinions, even though he is not licensed to practice medicine.⁸

In some cases, physicians in general practice, not shown to have made any special study or to have any special knowledge of insanity, were excluded as incompetent to render

³ The necessity for this discretion in the trial court is emphasized by Wigmore, *op. cit.*, vol. i, §561.

⁴ *Davis v. State*; *People v. Lowhone*; *Comm. v. Johnson*, all *supra*; *Comm. v. Spencer* (1912) 212 Mass. 438, 99 N.E. 266.

⁵ *Terr. v. Davis* (1886) 2 Ariz. 59, 10 Pac. 359; *Glover v. State* (1907) 129 Ga. 717, 724, 59 S.E. 816; *Davis v. State* (1871) 35 Ind. 496; *State v. Reddick* (1871) 7 Kans. 143, 150 (*dictum*); *Brady v. State* (1931) 116 Tex. Crim. 427, 34 S.W. (2d) 587; *Tendrup v. State* (1927) 193 Wis. 482, 214 N.W. 356.

⁶ *Braham v. State* (1904) 143 Ala. 28, 46, 38 So. 919; *Horton v. U.S.* (1899) 15 App. D.C. 310; *Glover v. State* (1907) 129 Ga. 717, 59 S.E. 816; *State v. Rose* (1917) 271 Mo. 17, 26, 195 S.W. 1013; *State v. Liolios* (1920) 285 Mo. 1, 14, 225 S.W. 941; *Braun v. State* (1920) 105 Neb. 355, 180 N.W. 567; *State v. Holland* (1917) 80 Tex. Crim. 637, 192 S.W. 1070.

⁷ Statutes sometimes provide that persons practicing medicine who fail to comply with the requirements regarding licensing, etc., shall not be permitted to testify as experts. La. Rev. Stat. (Marr's, 1915), §4496; Wis. Stat. (1931), §147.14. This, however, seems to refer only to persons holding themselves out as physicians, as a penalty for failure to comply with the statute, and does not mean that anyone who is not a licensed physician is incompetent to testify as an expert.

⁸ *State v. Liolios* (1920) 285 Mo. 1, 16, 225 S.W. 941 (*dictum*); *People v. Rice* (1899) 159 N.Y. 400, 54 N.E. 48 (*dictum*).

opinions on the subject, and such rulings have been upheld as within the discretion of the trial court.⁹ And in at least one state, Louisiana, it has been held error for the trial court to admit as an expert a physician not shown to have had any experience or knowledge of mental disease.¹⁰ In Wisconsin, it has been held not only that a doctor must be proved to have some special knowledge of the subject of mental disease, but that even such special knowledge is insufficient, if derived merely from study and from books; he must have had actual personal experience with insanity cases.¹¹ This requirement has been expressly rejected in several other courts,¹² and

⁹ *Bishop v. Comm.* (1901) 109 Ky. 558, 60 S.W. 190; *Russell v. State* (1876) 53 Miss. 367; *Reed v. State* (1884) 62 Miss. 405; *Ashby v. State* (1911) 124 Tenn. 684, 721, 139 S.W. 872; *Watson v. State* (1915) 133 Tenn. 198, 180 S.W. 168; *McElroy v. State* (1922) 146 Tenn. 442, 242 S.W. 883.

¹⁰ *State v. Diron* (1922) 150 La. 550, 90 So. 920.

¹¹ *Soquet v. State* (1888) 72 Wis. 659, 40 N.W. 391; *Zoldoske v. State* (1892) 82 Wis. 580, 52 N.W. 778; *Lowe v. State* (1903) 118 Wis. 641, 96 N.W. 417. In these cases, the court purported to follow an earlier case, *Boyle v. State* (1883) 57 Wis. 472, 15 N.W. 827. But that case merely held that it was error to permit a doctor, who disclaimed any knowledge of the subject involved, to state that "in Taylor's *Jurisprudence*, such cases are recorded." Since the book itself could not be read in evidence, said the court, it was equally erroneous to permit the witness, who had no personal knowledge or opinion, to give extracts from it, relying on his memory for their correctness. In *Soquet v. State*, *supra*, the *Boyle* Case is cited as laying down the rule that an expert is incompetent who bases his opinion entirely on knowledge received from books, or instruction, and not experience. But the *Boyle* Case had merely held that a doctor who had no personal knowledge could not testify that certain facts are "recorded" in a scientific book. It is quite another matter to hold that a doctor who has studied the subject, in scientific works, and in medical school, and has opinions on the subject, may not testify to his opinions if he has not had actual personal experience with cases.

¹² "So long as the opinion of the medical expert is his own it is admissible, though it be based on the study of books rather than on his own experience." *Swanson v. Hood* (1918) 99 Wash. 506, 516, 170 Pac. 135.

"To deny the competency of a physician who does not know his facts

has perhaps been overruled even in Wisconsin.¹³ In Massachusetts, and perhaps also in Maine, a physician in general practice, but without special training or experience in mental disease, may testify to an opinion as to the mental condition of a patient whom he has attended, based upon his own personal observation and experience, but may not give opinions on hypothetical questions.¹⁴

Bases for Expert Opinion. A qualified expert may testify to his opinion concerning the defendant's mental condition based either upon (1) personal examination of the defendant made by the witness, or (2) the testimony in the case, if he has been in court and heard it all. (3) He may also give his opinion upon hypothetical cases propounded by counsel.

from personal observation alone is to reject medical testimony almost in its entirety. To allow any physician to testify who claims to know solely by personal experience is to appropriate the witness stand to impostors. Medical science is a mass of transmitted data; the generalizations are rare which are the result of one man's personal observation exclusively; and the law cannot expect its petitioners to obtain these rare persons. The law must recognize the methods of medical science. It cannot stultify itself by establishing, for legal remedies, a rule never considered necessary by the medical profession itself. It is enough for a physician testifying to a medical fact, that he is by training and occupation a physician, whether his source of information for that particular fact is in part or entirely the hearsay of his fellow practitioners and investigators is immaterial." *Perkins v. U.S.* (1915) 228 Fed. 408, 419, quoting from Wigmore, *Evid.*, §782.

¹³ In *Tendrup v. State* (1927) 193 Wis. 482, 214 N.W. 356, the court said: "That physicians are qualified as experts to give testimony in such cases is generally recognized in the law," citing 22 C.J., p. 543, §640. Nothing is said in this case about actual experience, and it is perhaps significant that the court cites law encyclopedias, but not the prior Wisconsin cases.

¹⁴ *Baxter v. Abbott* (1856) 73 Mass. 71; *Comm. v. Rich* (1859) 80 Mass. 335; *Comm. v. Spencer* (1912) 212 Mass. 438, 447, 99 N.E. 266. In Maine, the court has also held that attending or family physicians may testify to the mental condition of their patients, but the cases are not clear whether this is in accord with the Massachusetts rule, or whether the court felt that the physicians whose testimony was involved were qualified

1. *Personal Examination.* An expert in insanity who has made a personal examination of the defendant after the commission of the crime, may state his opinion not only of defendant's mental condition at the time of the examination, but also as to the probable duration of the condition,¹⁵ and whether it existed at the time of the crime charged.¹⁶ He may also testify to an opinion that the defendant is feigning and simulating insanity.¹⁷ Particular intelligence and neurological tests to which the witness subjected the defendant may be described by him.¹⁸ However, it is not necessary that the expert state the detailed circumstances of the examination, before giving his findings; the facts and symptoms which he observed, and on which he bases his opinion, may be brought out on cross-examination.¹⁹ It is

as experts. *Fayette v. Chesterville* (1885) 77 Me. 28; *Ireland v. White* (1906) 102 Me. 233, 66 Atl. 477.

¹⁵ *State v. McGruder* (1904) 125 Ia. 741, 748, 101 N.W. 646; *People v. Gavrilovich* (1914) 265 Ill. 11, 106 N.E. 521.

¹⁶ *Shaffer v. U.S.* (1904) 24 App. D.C. 417; *Comm. v. Johnson* (1905) 188 Mass. 382, 74 N.E. 939; *Freeman v. People* (1847) 4 Denio (N.Y.) 9; *State v. Roselair* (1910) 57 Ore. 8, 109 Pac. 865; *Comm. v. Gerade* (1891) 145 Pa. 289, 22 Atl. 464; *Lane v. State* (1910) 59 Tex. Crim. 595, 129 S.W. 353.

Contra: *State v. Larkins* (1897) 5 Ida. 200, 47 Pac. 945 (holding that a physician examining defendant for a wound on his neck, four hours after the homicide, may testify to his sanity at that time, but may not give an opinion as to his sanity just preceding the homicide); *State v. Hyde* (1912) 90 S.C. 296, 73 S.E. 180 (doctor who had examined defendant may give an opinion of his mentality at the time of the examination, but not as of the time of the crime, except upon hypothetical questions. The explanation given for this rule is that an expert may give an opinion upon facts within his own knowledge, but "if the facts upon which his opinion is formed are in issue, his testimony is not admissible except upon a hypothetical state of facts." This seems unsound. See Wigmore, *Evid.* [2d ed., 1923], vol. iv, §1921).

¹⁷ *People v. Krauser* (1925) 315 Ill. 485, 146 N.E. 593; *State v. Pritchett* (1890) 106 N.C. 667, 11 S.E. 357; *State v. Hayden* (1878) 51 Vt. 296, 306.

¹⁸ *People v. Haensel* (1920) 293 Ill. 33, 127 N.E. 181; *People v. Krauser* (1925) 315 Ill. 485, 146 N.E. 593.

¹⁹ *Blocker v. State* (1926) 92 Fla. 878, 882, 110 So. 547; *State v. Felter*

facts assumed, so long as his answer is based on the assumption that they are true.²⁹ Some of the older cases held that the hypothetical question had to embrace all the evidence in the case on the issue of insanity.³⁰ Some cases still hold that the question should embrace substantially all the facts on the issue where there is no conflict in the evidence,³¹ and that where there is conflict, the question should include all the undisputed facts, plus such facts as counsel deems established by the evidence.³² Most cases now simply hold that where the evidence is conflicting, each side may frame hypothetical questions containing only the facts tending to support its theory of the case.³³ Some of these add, however, that the question must fairly reflect all the vital facts in the case, for to allow a question which fails to do so would only tend to confuse the jury.³⁴ To some extent,

²⁹ *Ryan v. People* (1911) 50 Colo. 99, 114 Pac. 306.

³⁰ *People v. Thurston* (1852) 2 Park. Crim. R. (N.Y.) 49, 138; *Webb v. State* (1880) 9 Tex. App. 490; *Leache v. State* (1886) 22 Tex. App. 279, 3 S.W. 539; *Williams v. State* (1897) 37 Tex. Crim. 348, 39 S.W. 687.

³¹ *Parrish v. State* (1903) 139 Ala. 16, 36 So. 1012; *Douglass v. State* (1926) 21 Ala. App. 289, 107 So. 791; *McGonigal v. People* (1923) 74 Colo. 270, 220 Pac. 1003; *Davis v. State* (1871) 35 Ind. 496.

³² *Pate v. State* (1922) 152 Ark. 553, 560, 239 S.W. 27; *Kelley v. State* (1920) 146 Ark. 509, 515, 226 S.W. 137.

³³ *Parrish v. State* (1903) 139 Ala. 16, 36 So. 1012; *Douglass v. State* (1926) 21 Ala. App. 289, 107 So. 791; *Howard v. People* (1900) 185 Ill. 552, 57 N.E. 441; *Gueting v. State* (1879) 66 Ind. 94; *Goodwin v. State* (1884) 96 Ind. 550; *McHargue v. State* (1923) 193 Ind. 204, 139 N.E. 316; *State v. Tharp* (1930) 48 Ida. 636, 284 Pac. 201; *State v. Douglas* (1925) 312 Mo. 373, 401, 278 S.W. 1016; *State v. Crowe* (1909) 39 Mont. 174, 102 Pac. 579; *Hamblin v. State* (1908) 81 Neb. 148, 115 N.W. 850; *Cowley v. People* (1881) 83 N.Y. 464; *People v. Augsburg* (1884) 97 N.Y. 501; *People v. Truck* (1902) 170 N.Y. 203, 63 N.E. 281; *State v. Ward* (1920) 180 N.C. 693, 104 S.E. 531; *Burt v. State* (1897) 38 Tex. Crim. 397, 40 S.W. 1000, 43 S.W. 344; *Newman v. State* (1924) 99 Tex. Crim. 363, 269 S.W. 440; *State v. Cook* (1911) 69 W. Va. 717, 72 S.E. 1025; *Schissler v. State* (1904) 122 Wis. 365, 99 N.W. 593.

³⁴ *Burgo v. State* (1889) 26 Neb. 639, 42 N.W. 701; *State v. Thomson* (1910) 153 N.C. 618, 69 S.E. 254; *Oborn v. State* (1910) 143 Wis. 249,

the form and content of hypothetical questions are matters resting in the discretion of the trial court.³⁵ It may prevent counsel from singling out particular facts, or testimony of single witnesses, as premises for questions.³⁶ In at least one case it has been said that the only general rule applicable to all cases which it is practicable to frame is that hypothetical questions "must be fairly framed with reference to the facts that have been offered and relied on in the evidence, and the hypothesis must be clearly and distinctly presented, so that there may be no misunderstanding by the witness and no confusion of the minds of the jury," and that in some cases it may be proper to require the question to embody substantially all the facts, but that others "might admit of, or even require, the separation of the facts in evidence . . . into two or more groups for the purpose of an opinion by the expert."³⁷

It is agreed that hypothetical questions should not include matter as to which there is no supporting evidence,³⁸ or which

126 N.W. 737. The Illinois court has said that hypothetical questions should include "all the facts as claimed and proved by the party himself." *People v. Geary* (1921) 297 Ill. 608, 131 N.E. 97. *Contra: People v. Truck* (1902) 170 N.Y. 203, 63 N.E. 281 (where an objection that a question by the prosecutor assumed "only a very few of the facts in the case" was held properly overruled).

³⁵ "Thus the length of hypothetical questions, or whether the facts assumed are within the hypothesis on which it is claimed the case rests, or whether a witness is professionally qualified, or is sufficiently acquainted with the history of the case to give an opinion, are as well within the reasonable exercise of this power as the order of presentation of evidence, or the length of time permitted to counsel for argument if beyond the limit fixed by a general rule, or the scope of cross-examination." *Comm. v. Johnson* (1905) 188 Mass. 382, 74 N.E. 939.

³⁶ *Ince v. State* (1906) 77 Ark. 426, 93 S.W. 65.

³⁷ *Horton v. U.S.* (1899) 15 App. D.C. 310, 326.

³⁸ *Parrish v. State* (1903) 139 Ala. 16, 36 So. 1012; *Douglass v. State* (1926) 21 Ala. App. 289, 107 So. 791; *McGonigal v. People* (1923) 74 Colo. 270, 220 Pac. 1003; *Guetig v. State* (1879) 66 Ind. 94; *State v. Hanley* (1886) 34 Minn. 430, 26 N.W. 397; *State v. Scott* (1889) 41

is contrary to the evidence,³⁹ or argumentative,⁴⁰ or which does not pertain to the question of defendant's mental soundness.⁴¹ However, technical accuracy in this regard is not required.⁴² Where counsel proposes to ask a hypothetical question assuming premises as to which there has as yet been no evidence, he should, it has been held in one case, at least make the offer conditional upon an obligation on his part subsequently to produce such testimony, and where counsel complains of the refusal to allow such question, he must show that such evidence was in fact later placed before the jury.⁴³

The jury, of course, should not take the truth of the statements in the hypothetical question for granted. Whether the facts assumed in the question are true, is a question for the jury.⁴⁴ It must scrutinize the evidence carefully, and determine what part of it, if any, is true;⁴⁵ if it finds that any fact included in the question is not true, it should disregard the opinion based on that question; if it finds that all the facts in the question are true, it should give the opinion such weight as it deems proper.⁴⁶

Examination by Experts Appointed by the Court. In a number of states, statutes have been enacted, especially in recent years, providing for the appointment of experts by the trial

Minn. 365, 43 N.W. 62; *Kearney v. State* (1890) 68 Miss. 233, 8 So. 292; *State v. Dunn* (1903) 179 Mo. 95, 110, 77 S.W. 848; *Sharkey v. State* (1886) 4 Ohio Cir. Ct. 101; *Kirby v. State* (1912) 68 Tex. Crim. 63, 150 S.W. 455.

³⁹ *Betts v. State* (1905) 48 Tex. Crim. 522, 89 S.W. 413.

⁴⁰ *State v. Lathrop* (1920) 112 Wash. 560, 192 Pac. 950.

⁴¹ *State v. Garrison* (1911) 59 Ore. 440, 117 Pac. 657.

⁴² *Parrish v. State* (1903) 139 Ala. 16, 36 So. 1012; *Douglass v. State* (1926) 21 Ala. App. 289, 107 So. 791.

⁴³ *State v. Ayles* (1908) 120 La. 661, 45 So. 540.

⁴⁴ *State v. Baber* (1881) 74 Mo. 292; *State v. Pagels* (1887) 92 Mo. 300, 4 S.W. 931; *Davis v. State* (1871) 35 Ind. 496; *Lake v. People* (1854) 1 Park. Crim. R. (N.Y.) 495.

⁴⁵ *Gueting v. State* (1879) 66 Ind. 94.

⁴⁶ *Kelley v. State* (1920) 146 Ark. 509, 226 S.W. 137.

court, to examine a defendant whose mental condition is in question, and testify at the trial. Most of these statutes make the appointment of such experts discretionary with the court. When the defendant's mental condition or responsibility is in issue, the court may, but is not required to, appoint a number of experts, not exceeding three, to serve as expert witnesses in the case. Provisions of this sort have been enacted in New York,⁴⁷ Rhode Island,⁴⁸ Vermont,⁴⁹ and, more recently, Colorado,⁵⁰ and

⁴⁷ N.Y. Consol. Laws (Cahill's, 1930), chap. 31, §31. This law was passed in 1915, and provides that in a criminal action, or *habeas corpus* or *certiorari* proceeding, in which the soundness of mind of a person is in issue, the court or judge may appoint not more than three disinterested competent physicians to examine the person, and these physicians may be sworn as witnesses at the instance of any party. The law has not proved very successful. By poor compilation and indexing of the statute book, it has largely been lost sight of, a fact which the New York State Bar Association has tried to remedy by reminding judges of it in appropriate cases. *Report of N.Y. State Bar Ass'n* (1916), vol. xxxix, p. 131. In 1928, the New York State Crime Commission recommended that it be entirely revised. N.Y. State Crime Commission, *Special Reports on Firearms Legislation and Psychiatric and Expert Testimony in Criminal Cases* (1928), p. 17.

⁴⁸ R.I. Gen. Laws (1923), §5002: "Any justice of the superior court may, in any cause, civil or criminal, on motion of any party therein, at any time before the trial thereof, appoint one or more disinterested skilled persons, whether they be residents or non-residents, to serve as expert witnesses therein."

⁴⁹ Vt. Gen. Laws (1917), §2620. This act dates back to 1882, and authorizes a superior judge or the attorney general, in order "to prevent a failure of justice," to order an examination to be made by experts, in the investigation of a supposed crime. The order is made only on the petition of the state's attorney of the county, stating the facts requiring the order, and naming the experts by whom examination is to be made.

⁵⁰ Colo. Laws, 1927, chap. 90, §2: "The judge may . . . appoint a commission of one or more physicians, specialists in mental diseases, to examine the defendant during said period [of commitment for observation], and the court may call and examine said physicians as witnesses at the trial. Either the state or the defendant or both may call said physician or physicians as witnesses but this shall not preclude the state or defendant from using other physicians."

Wisconsin.⁵¹ California and Indiana have also passed similar laws during the last few years, but have made the appointment of experts by the court mandatory in all cases where the defense of insanity is pleaded.⁵²

In Louisiana, whenever a defendant enters a plea of insanity, the trial judge is required to notify the coroner of the parish and the superintendents of the two state insane hospitals, and these three form a Commission of Lunacy to inquire into the defendant's condition. Unlike the provisions of the states just mentioned, the Louisiana law does not contemplate that these experts are to testify on the trial; instead, their inquiry constitutes a preliminary determination of the issue, and if they find the defendant insane, he is forthwith committed to an insane institution and the criminal proceedings are dropped. If the Commission finds the defendant not insane, a judicial trial is had of the issue of insanity.⁵³

Even in states where no express statutory sanction exists, courts have sometimes appointed experts to examine the defendant as to his mental condition,⁵⁴ and this practice has been approved.⁵⁵ The ultra-conservative Michigan Supreme Court, how-

⁵¹ Wis. Stat. (1931), §357.12 (1), provides that "whenever, in any criminal case, expert opinion evidence becomes necessary or desirable," the judge, after notice and hearing, may appoint not more than three disinterested qualified experts, to testify at the trial. The experts called by the court may be cross-examined by both parties, and may be required by the court to file a written report, which may be read by the witness to the jury.

⁵² In both of these states, the defense of insanity must be set up by a special plea. Whenever such a plea is made, the court must appoint experts to examine the defendant and testify at the trial. Cal. Stat. (1929), chap. 385, p. 702; Cal. Penal Code (1931), §1027; Ind. Acts (1927), chap. 102; Ind. Ann. Stat. (Burns' Supp., 1929), §2291.

⁵³ La. Code of Crim. Proc. (1928), art. 268.

⁵⁴ *State v. Cockriel* (1926) 314 Mo. 699, 285 S.W. 440; *State v. Petty* (1910) 32 Nev. 384, 108 Pac. 934; *State v. Paine* (1897) 49 La. Ann. 1092, 22 So. 316; *State v. Genna* (1927) 163 La. 701, 112 So. 655.

⁵⁵ *People v. Linton* (1929) 102 Cal. App. 608, 283 Pac. 389; *State v. Genna, supra*; *State v. Horne* (1916) 171 N.C. 787, 88 S.E. 433.

ever, has held it unconstitutional, even where a statute permitting it had been passed,⁵⁶ and this decision has been followed by the Illinois Supreme Court.⁵⁷ In the Michigan case, the court held invalid a statute requiring the court, in homicide cases where the issues involve expert knowledge or opinion, to appoint not more than three experts, to investigate such issues and testify at the trial. The court discussed three objections to the act: (1) It violated the constitutional requirement of separation of powers, by allotting to the court functions which were in no sense judicial, but were administrative, belonging to the prosecuting attorney.⁵⁸ (2) There was no provision for notice to either party of the appointment of the experts.⁵⁹ (3) The jury would be sure to give more consideration to the opinions of experts appointed by the court than to the opinions of perhaps equally eminent experts called by the defense in rebuttal.⁶⁰

The soundness of the objections raised by the Michigan

⁵⁶ *People v. Dickerson* (1910) 164 Mich. 148, 129 N.W. 199.

⁵⁷ *People v. Scott* (1927) 326 Ill. 327, 157 N.E. 247.

⁵⁸ "The power of selecting and appointing witnesses who shall, after appointment, acquaint themselves with the matter in controversy, and testify concerning the same, is in no sense a judicial act, and, if exercised by the court in accordance with the mandate of section 3, would entirely change the character of criminal procedure, and would seriously endanger, if not absolutely destroy, those safeguards which our Constitution has so carefully enacted for the protection of the accused." *People v. Dickerson, supra*, p. 153.

⁵⁹ "The right of one accused of crime to know in advance the names of the witnesses who will testify against him and to examine into their character, means of knowledge, etc., in order that he may properly prepare his defense, is a right as ancient as our criminal jurisprudence." *Ibid.*, p. 154.

⁶⁰ "In the face of the certificate of character, fitness, and ability given to the court experts by the court, experts summoned by either side would receive but scant consideration at the hands of the jury; their testimony would be swept aside in a breath. Juries are most anxious to ascertain the opinion of the court as to the guilt or innocence of the accused, and, ordinarily, more than willing to adopt that opinion as their own. . . . The expert witnesses provided for by this section testify under a sanction which gives to their testimony practically the same weight as if it were

court, and concurred in by the Illinois court, has been assailed in various quarters,⁶¹ and squarely denied by the Supreme Court of Wisconsin.⁶² That a court has the power, as a general proposition, to call forth evidence or summon witnesses not produced by the parties, is certain.⁶³ There seems no reason for denying this power in the case of expert witnesses, but on the contrary, the practice should be especially permissible in such cases, since expert witnesses were historically regarded almost as *amici curiae*, and were called by the court.⁶⁴

Commitment to Hospital for Observation. Statutes providing for the commitment of a defendant whose mental condition is questioned, for observation for a period of time, usually limited to thirty days, exist in a few states. Maine and Vermont have had such statutes for some time,⁶⁵ and similar but more detailed

delivered by the court itself, and if that testimony, being against the accused, were either wilfully false or ignorantly mistaken, its baneful results would be appalling." *Ibid.*, pp. 154-155. The Michigan code of criminal procedure, adopted since this decision, provides for the summoning of experts by the court, to aid in the examination, in cases where a defendant accused of felony appears to be insane or was acquitted by reason of insanity. Mich. Comp. Laws (1929), §17241.

⁶¹ (1911), 24 *Harv. Law Rev.* 483; *Reports of Am. Bar Ass'n* (1926), vol. li, p. 441; Wigmore, *Evid.* (2d ed., 1923), vol. v, p. 436. Of the Michigan decision, Professor Wigmore said (*loc. cit.*): "It is a pity that the court suffered such a severe attack of dikastophobia on the sight of this harmless statute. As the history and authorities of the present subject are ignored in the opinion and as its fantastic logic would hardly be followed elsewhere, no further notice of its contents is needed." Only a few years after this was written, however, the Illinois Supreme Court, as we have seen, adopted this "fantastic logic," also ignoring history and authorities, and relying almost wholly on this single Michigan case.

⁶² *Jessner v. State* (1930) 202 Wis. 184, 231 N.W. 634. See also *State v. Horne* (1916) 171 N.C. 787, 88 S.E. 433.

⁶³ Wigmore, *op. cit.*, p. 435.

⁶⁴ Chamberlayne, *Modern Law of Evidence* (1912), vol. iii, §2376.

⁶⁵ Me. Rev. Stat. (1930), chap. 149, §1; Vt. Gen. Laws (1917), §2602. The Vermont act provides: "When a person is indicted or informed against for a criminal offense, or is committed to jail on a criminal charge . . . the presiding judge of the county court before whom such person is

provisions have recently been enacted in Ohio and Wisconsin.⁶⁶ The Ohio law, for example, provides that when insanity is set up as a defense, or when present insanity is in issue, the court shall have power to commit the defendant to an insane hospital for observation for a period not exceeding one month, and may in such case appoint not more than three specialists in mental diseases to investigate and examine the defendant, and testify at his trial or other hearing, as expert witnesses. The experts so appointed may be required to file a written statement under oath, which shall be filed in the case, but shall not be read in evidence except that it may be used by either counsel on the cross-examination of the witness. The Wisconsin act is similar, except that the written report of the chief physician of the hospital where the defendant was committed, or other experts appointed by the court, may be read in evidence by the witness to the jury. However, the Wisconsin act seems to apply only in cases involving the defendant's present mental condition at the time of the trial. The Colorado law, mentioned above, makes it mandatory for the trial judge to commit every defendant pleading insanity to a state hospital for the insane for a period not exceeding one month.⁶⁷

In Ohio, in addition to the provision already mentioned, the code of criminal procedure further provides that after a person has been convicted of felony, but before sentence, he may be

to be tried, may . . . if a plea of insanity is made in court or if he is satisfied that a plea of insanity will be made, order said person into the care of the superintendent of the Vermont state hospital for the insane, to be detained and observed by said superintendent until further order of said judge or of such county court, that the truth or falsity of such plea may be ascertained." The Maine provision is similar.

⁶⁶ Ohio Ann. Code (1930), §13441-4; Wis. Stat. (1931), §357.12 (3).

⁶⁷ Colo. Laws, 1927, chap. 90, §2: "Upon the making of any such plea of insanity, the judge shall forthwith commit the defendant to the Colorado Psychopathic Hospital at Denver or to the State Hospital at Pueblo where the defendant shall remain under observation for such time as the court may direct, not exceeding one month."

temporarily committed to an insane hospital for observation, in any case in which the court has "reasonable doubt as to the mental responsibility of such accused person." The superintendent of the hospital is required to report to the court concerning the person's condition, and the court thereupon may order his continued detention, or otherwise, as the facts of the case justify.⁶⁸

Examination as Compelling Defendant to Criminate Himself.

The prosecution is sometimes handicapped by the defendant's refusal to submit to an interview or examination by its experts, or by experts appointed by the court. Since oral examination and conversation are almost essential for an expert to form a sound opinion of a person's mental condition, and since this cannot be had without the person's consent, it is obviously difficult to make a complete psychiatric examination of a defendant who refuses to talk. In addition to this practical difficulty, the defendant's constitutional privilege not to be a witness against himself has been urged as a reason for excluding evidence obtained by such an examination. While the cases are far from unanimous, the majority of courts have not given this objection very much weight. Thus, it is held that the defendant cannot prevent experts from observing him while in jail or in court, or from testifying to an opinion regarding his sanity based on such observations.⁶⁹ Often a satisfactory examination of a person's mental condition cannot be made without submitting him to physical and neurological, as well as oral, tests. It is held that if the defendant voluntarily submits to such examination, the experts who examined him may testify to the fact, and to their opinion of his mental condition formed therefrom,⁷⁰ even

⁶⁸ Ohio Ann. Code (1930), §13451-3.

⁶⁹ *State v. Genna* (1927) 163 La. 701, 112 So. 655; *Burt v. State* (1897) 38 Tex. Crim. 397, 439, 40 S.W. 1000, 43 S.W. 344; *State v. Eastwood* (1901) 73 Vt. 205, 50 Atl. 1077.

⁷⁰ *Blocher v. State* (1926) 92 Fla. 878, 110 So. 547; *People v. Krauser* (1925) 315 Ill. 485, 146 N.E. 593; *State v. Church* (1906) 199 Mo. 605,

though defendant's attorney was not notified or his consent obtained.⁷¹ In some cases, evidence of such examination has been held admissible even when the defendant did not voluntarily submit, and objected to or resisted the examination.⁷² In other states, however, it is held that evidence obtained by an involuntary examination of the defendant's person is not admissible,⁷³ although it may be pointed out that none of these cases involved examinations made to determine mental condition.

Wisconsin has attempted to solve the difficulty of obtaining expert testimony for the prosecution by a statutory provision that "no testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the expert witnesses summoned by the prosecution have been given an opportunity to examine and observe the accused

636, 98 S.W. 16; *People v. Austin* (1910) 199 N.Y. 446, 93 N.E. 57; *State v. White* (1920) 113 Wash. 416, 194 Pac. 390.

⁷¹ *People v. Bundy* (1914) 168 Cal. 777, 145 Pac. 537 ("There is nothing in the law that makes notice or knowledge to counsel essential to a voluntary disclosure of facts by an accused person"); *Blocker v. State*, *supra*; *People v. Furlong* (1907) 187 N.Y. 198, 79 N.E. 978; *State v. Spangler* (1916) 92 Wash. 636, 159 Pac. 810.

⁷² *State v. Petty* (1910) 32 Nev. 384, 108 Pac. 934 (examination by experts appointed by court, over objection of defendant's counsel); *State v. Chandler* (1923) 126 S.C. 149, 119 S.E. 774 (contention that examination was "forced on defendant and contrary to his will, and while unable to help himself or resist the examination" simply ignored, and conviction affirmed); *State v. Coleman* (1924) 96 W. Va. 544, 123 S.E. 580 (defendant examined while handcuffed; held: "Ordinarily the result of a physical examination made without the consent of the accused is not admissible in evidence, but we find the weight of authority in this country is to the effect that where the defense of insanity is made, evidence of the facts disclosed by a physical and mental examination of accused by physicians either prior to or during the trial, *with or without his consent*, does not violate the constitutional privilege of accused not to be a witness against himself").

⁷³ *Bethel v. State* (1928) 178 Ark. 277, 10 S.W. (2d) 370; *State v. Height* (1902) 117 Ia. 650, 91 N.W. 935; *State v. Horton* (1913) 247 Mo. 657, 153 S.W. 1051. See cases pro and con, 24 *Illinois Law Rev.* 487 (1929).

if such opportunity shall have been seasonably demanded," and this has been held constitutional by the state supreme court.⁷⁴

Professional Privilege of Physicians. By statute in most states, information acquired concerning his patient by a physician while acting in a professional capacity is privileged. Under these statutes, a physician who has attended a defendant professionally cannot be asked to testify to his opinion of defendant's mental condition, based upon information thus obtained.⁷⁵ But to exclude such opinion, it must be shown not only that the information was acquired while attending the person in a professional capacity, but also that it was necessary to enable him to perform some professional act.⁷⁶ The mere fact that the witness was the person's physician does not exclude his opinion, when it does not appear that he obtained his facts in the course of professional relations with the person.⁷⁷

The privilege does not apply to experts in mental diseases who merely observe a defendant while in confinement or examine him solely for the purpose of testifying at his trial, for that does not constitute attending a patient in a professional capacity.⁷⁸ This is true even where the physician was asked by

⁷⁴ Wis. Stat. (1931), §357.12 (1); *Jessner v. State* (1930) 202 Wis. 184, 231 N.W. 634.

⁷⁵ *Larson v. State* (1912) 92 Neb. 24, 137 N.W. 894; *People v. Koerner* (1897) 154 N.Y. 355, 48 N.E. 730.

⁷⁶ *People v. Koerner*, *supra*; *People v. Schuyler* (1887) 106 N.Y. 298, 12 N.E. 783.

⁷⁷ *Wheeler v. State* (1902) 158 Ind. 687, 63 N.E. 975.

⁷⁸ *State v. Murphy* (1928) 205 Ia. 1130, 217 N.W. 225 (doctors who merely "observed" defendant while he was confined in state hospital); *People v. Hoch* (1896) 150 N.Y. 291, 44 N.E. 976 (physician sent by prosecution to jail to observe and examine defendant); *People v. Furlong* (1907) 187 N.Y. 198, 79 N.E. 978; *State v. Newsome* (1928) 195 N.C. 552, 143 S.E. 187 (psychiatrist appointed by court to examine defendant); *People v. Schuyler* (1887) 106 N.Y. 298, 12 N.E. 783 (jail physician, who "kept an eye" on defendant while he was confined, but who never treated him for any illness).

the defense to examine the accused, and was later called as witness by the prosecution.⁷⁹

The privilege belongs to the patient, not to the physician, and the patient may waive it.⁸⁰ But it has been held that the fact that the accused, on cross-examination, testified to the treatment received by the physician, and to the physician's opinion of his condition, does not constitute a waiver; he may still object to having the physician testify to such treatment and opinion.⁸¹

Expert Opinion as to "Responsibility" and Knowledge of Right and Wrong. While expert witnesses may testify to opinions as to whether the defendant is "sane" or "insane," they may not state whether in their opinion the defendant was "responsible," for responsibility is a legal concept, to be decided by the jury in accordance with the rules laid down by the court.⁸² A few courts have held that experts may not even express an opinion as to whether the defendant was capable of knowing right from wrong,⁸³ or whether he committed the act as a result of irresistible impulse or delusion.⁸⁴ The reason given for ex-

⁷⁹ *People v. Austin* (1910) 199 N.Y. 446, 452, 93 N.E. 57.

⁸⁰ *Wigmore, Evid.* (2d ed., 1923), vol. v, §2388.

⁸¹ *Larson v. State* (1912) 92 Neb. 24, 137 N.W. 894. However, if a party voluntarily testifies, on the trial, to his condition, it seems that this should be deemed a waiver of the privilege for the testimony of a physician who has been consulted about that condition. *Wigmore, op. cit.*, §2389. This was conceded by the Nebraska court in the *Larson Case*, for it pointed out that the testimony "was drawn from him by the state's attorney on cross-examination," and that "if the defendant had offered these matters as evidence in his own behalf, the position of the state (that the privilege had been waived) would be unassailable." *Ibid.*, p. 30.

⁸² *State v. Wade* (1921) 96 Conn. 238, 113 Atl. 458; *State v. McGruder* (1904) 125 Ia. 741, 101 N.W. 646; *State v. Bennett* (1909) 143 Ia. 214, 121 N.W. 1021.

⁸³ *State v. Palmer* (1901) 161 Mo. 152, 174, 61 S.W. 651; *State v. Brown* (1904) 181 Mo. 192, 215, 79 S.W. 1111.

⁸⁴ *State v. Brown, supra*; *State v. Scott* (1889) 41 Minn. 365, 369, 43 N.W. 62.

cluding such opinions is that these are the very questions which the jury must decide, and expert witnesses should not be permitted to usurp the function of the jury. This argument, however, is unsound.⁸⁵ In most states, expert opinion as to whether the defendant was sane enough to know right from wrong or to resist the impulse is accepted without question,⁸⁶ and it has been expressly held in some cases that such questions may be testified to, even though they are matters for the jury ultimately to pass upon.⁸⁷

In favor of this latter rule it may be said that in most cases in which the defense of insanity is raised, it is comparatively easy to determine whether the accused was entirely sound of mind, or whether he was afflicted with some sort of mental disorder. The difficult cases are those in which it is admitted that the accused is to some extent abnormal, but where the question at issue is whether or not at the time of the act he was so disordered mentally as to be incapable of knowing right from wrong, or of resisting the impulse to commit it. It is upon this question that the jury need the help of the experts, and to deprive the jury of this help is to require them to decide this crucial question solely upon their own blundering conjectures. On the other hand, at least one eminent writer has condemned

⁸⁵ Wigmore, *Evid.* (2d ed., 1923), vol. iv, §1921; *State v. McGruder* (1904) 125 Ia. 741, 101 N.W. 646.

⁸⁶ Among the many cases in which experts were allowed to testify to opinions concerning defendant's ability to distinguish right from wrong, etc., are: *Fondren v. State* (1920) 204 Ala. 451, 86 So. 71; *Bass v. State* (1929) 219 Ala. 282, 122 So. 45; *Comm. v. Cooper* (1914) 219 Mass. 1, 106 N.E. 545; *State v. Peel* (1899) 23 Mont. 358, 59 Pac. 169; *State v. Noel* (1926) 102 N.J.L. 659, 674, 133 Atl. 274; *State v. Banner* (1908) 149 N.C. 519, 63 S.E. 84; *State v. Jones* (1926) 191 N.C. 753, 133 S.E. 81; *Comm. v. Cavalier* (1925) 284 Pa. 311, 131 Atl. 229; and cases cited in *State v. Roselair* (1910) 57 Ore. 8, 109 Pac. 865.

⁸⁷ *State v. Roselair, supra*. In other cases, it has been held that even non-expert witnesses may testify whether in their opinion the defendant knew right from wrong. See p. 236.

the practice of taking the opinions of expert witnesses as to the defendant's capacity to know right from wrong.⁸⁸

Cross-Examination of Experts. The rules governing cross-examination are more liberal than those of direct examination. The expert's opinion may be asked on cross-examination not only on facts assumed by the questioner to have been proved, but also on purely abstract and imaginary questions, in order to obtain his opinion on all possible theories of the case, and to test the value and accuracy of his opinions.⁸⁹ He may also be asked concerning the authorities he accepts, and then the cross-examiner may incorporate in his question such opinion as may be found in these works tending to contradict the witness.⁹⁰

An expert may also be asked on cross-examination his opinion on portions of the evidence,⁹¹ and whether any particular fact or group of facts is "consistent" with sanity.⁹² In other words,

⁸⁸ "The most fruitful source of error and confusion in this field of law is traceable to the requirement that the expert say categorically whether or not the hypothetical person (whom everyone knows to be the defendant on trial) did or did not know right from wrong. This question is purely within the province of the jury, who must answer it as they must any other matter of questionable fact; all the expert should be asked to do, and all his training qualifies him to do, is to pass judgment, not upon the ethicolegal question of right and wrong, but upon the *medical question* of whether or not the defendant was mentally unsound, a question that his peculiar training and experience, and his study of the offender's case, entitles him to answer." Glueck, *Mental Disorder and the Criminal Law* (1925), p. 309, note.

⁸⁹ *Parrish v. State* (1903) 139 Ala. 16, 43, 36 So. 1012; *Snell v. U.S.* (1900) 16 App. D.C. 501, 519; *McHargue v. State* (1923) 193 Ind. 204, 215, 139 N.E. 316; *People v. Augsbury* (1884) 97 N.Y. 501; *People v. Pekarz* (1906) 185 N.Y. 470, 78 N.E. 294.

⁹⁰ *State v. Wade* (1921) 96 Conn. 238, 250, 113 Atl. 458.

⁹¹ *People v. Sutton* (1887) 73 Cal. 243, 15 Pac. 86 (where such questions were held proper on cross-examination as whether the expert considered the fact that a man paid his debts promptly evidence of insanity).

⁹² *People v. Krist* (1901) 168 N.Y. 19, 33, 60 N.E. 1057; *People v. Monat* (1911) 200 N.Y. 308, 314, 93 N.E. 982; *Rogers v. State* (1915) 78 Tex. Crim. 225, 180 S.W. 674. In Vermont it seems that a witness who

an expert who has testified on the basis of certain facts that the defendant is insane, may be asked by the prosecutor whether each in turn of the particular facts or incidents upon which he bases his opinion is alone sufficient to prove insanity. Invariably, the answer is no. Thus, having proved that there is no single fact in the case which in itself proves insanity, the prosecutor often argues that there is no proof of insanity.⁹³ A few courts have disapproved this method of cross-examination, pointing out that "the mental capacity of a party is not demonstrated by a single occurrence. It depends rather upon a long course of behavior and mental phenomena."⁹⁴

Weight and Value of Expert Testimony. The weight to be given to expert testimony is a matter for the jury to determine. They are not bound by the opinions of experts, but should scrutinize such opinions carefully and give them such weight as they deem proper.⁹⁵ They may even reject all the expert testimony,

has heard all or nearly all of the evidence may be asked his opinion on the question of sanity based on the testimony of each witness who has testified to facts bearing on that issue. *State v. Hayden* (1878) 51 Vt. 296.

⁹³ Dr. John E. Lind, speaking of this method of cross-examination sometimes resorted to by prosecutors, says ("Cross-Examination of the Alienist" [1922] 13 *Jour. Crim. Law & Crim.* 232): "This is quite effective and exasperating, its effectiveness lying in the fact that mental disorder is, speaking broadly, not demonstrable in any examination of the patient at one time, nor in any single act committed by him, but in a broad view of his conduct over a certain period of time or in the circumstances and setting, say, of his criminal act. . . ."

"The doctrine of probability, too, which lends strength to the opinion, is not available when the symptoms are taken up singly. Thus the prosecuting attorney may take a single act, quoted by the alienist, out of its setting and force the physician to admit that this is not necessarily an insane act or a symptom of insanity. Then he may say: 'In other words, doctor, you have admitted that this is not a symptom of insanity; in other words, that it means nothing. Now, one thousand times nothing is still nothing, isn't it?' Which is perfectly true, mathematically speaking, but in medicine the whole is sometimes greater than the sum of all its parts."

⁹⁴ *State v. Garrison* (1911) 59 Ore. 440, 117 Pac. 657.

⁹⁵ *Braham v. State* (1904) 143 Ala. 28, 38 So. 919; *Howard v. State*

though it is without conflict.⁹⁶ In the great majority of states, judges are prohibited from commenting on the evidence, and may not influence the jury's judgment by stating that the testimony of experts is of greater or less weight than any other.⁹⁷ Accordingly, the jury should not be told either that the testimony of experts is to be received "with great caution,"⁹⁸ or that such testimony is entitled to less weight than that of non-experts,⁹⁹ or greater,¹⁰⁰ or equal¹⁰¹ weight.

While the supreme tribunals have generally held that trial courts should not express any opinions to juries regarding the

(1911) 172 Ala. 402, 55 So. 255; *Williams v. State* (1888) 50 Ark. 511, 9 S.W. 5; *Ryan v. People* (1911) 50 Colo. 99, 114 Pac. 306; *People v. Harvey* (1919) 286 Ill. 593, 122 N.E. 138; *People v. Limeberry* (1921) 298 Ill. 355, 131 N.E. 691; *People v. Ferraro* (1900) 161 N.Y. 365, 55 N.E. 931; *Flanders v. State* (1916) 24 Wyo. 81, 156 Pac. 1121; *U.S. v. Faulkner* (1888) 35 Fed. 730; *U.S. v. Chisholm* (1906) 149 Fed. 284, 289.

⁹⁶ *Parrish v. State* (1903) 139 Ala. 16, 36 So. 1012; *Comm. v. Shults* (1908) 221 Pa. 466, 70 Atl. 823; *U.S. v. Perkins* (1915) 221 Fed. 109.

In California, it is expressly provided by statute, that the court shall instruct the jury substantially as follows: "Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but they should give to it the weight to which they find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable . . ." and that no further instruction on the subject of opinion evidence need be given. Cal. Penal Code (1931) §1127b.

⁹⁷ *People v. Ferraro, supra*.

⁹⁸ *People v. Barthleman* (1898) 120 Cal. 7, 52 Pac. 112; *People v. Methever* (1901) 132 Cal. 326, 333, 64 Pac. 481. The California court, while disapproving such instructions, held them no error. In Tennessee, it has been held no error to instruct the jury that expert testimony is to be received with caution. *Wilcox v. State* (1894) 94 Tenn. 106, 113, 28 S.W. 312.

⁹⁹ *State v. Townsend* (1885) 66 Ia. 741, 24 N.W. 535.

¹⁰⁰ *Ryder v. State* (1897) 100 Ga. 528, 28 S.E. 246; *Smith v. State* (1906) 127 Ga. 56, 56 S.E. 116; *Goodwin v. State* (1884) 96 Ind. 550; *Sanders v. State* (1883) 94 Ind. 147.

¹⁰¹ *Ryan v. People* (1911) 50 Colo. 99, 114 Pac. 306.

weight to be given to expert testimony, they have themselves sometimes given vent to their views on the subject, and these have not always taken the form of graceful compliments to the members of the other profession. The Kentucky Supreme Court, not many years ago, said in the course of an opinion that expert testimony is regarded in law as the weakest kind of testimony "because it is only a species of hearsay," based largely upon the statements of others.¹⁰² More cynical is the observation of the Missouri court that "wherever and whenever a distinguished expert and author on insanity was called on the witness stand, he invariably made out the defendant to be insane."¹⁰³ Similar is the statement made by Maxwell, J., of the Nebraska Supreme Court, that 'the ordinary medical expert's testimony, in regard to insanity, particularly where graduates of different schools of medicine are pitted against each other, is of the most unreliable character," and that "it is certain that if the person who commits an atrocious murder has been eccentric in his conduct, although perfectly sane, apparently, plenty of alleged experts can be found who will testify in effect that he was of unsound mind, while the same proof, if offered to justify robbery, larceny, burglary, or other ordinary offense, would be laughed out of court."¹⁰⁴ For this reason the same judge concluded that "it is probable that there is no better proof of the sanity or insanity of a person than the testimony of those who are intimately acquainted with him and have observed his conduct for months or years." With this conclusion, even so eminent a bench as the New York Court of Appeals has agreed, saying, "It is generally safer to take the judgment of unskilled jurors than the opinions of hired and generally biased experts."¹⁰⁵

¹⁰² *White v. Comm.* (1922) 197 Ky. 79, 245 S.W. 892.

¹⁰³ *State v. Soper* (1899) 148 Mo. 217, 236, 49 S.W. 1007.

¹⁰⁴ *Burgo v. State* (1889) 26 Neb. 639, 42 N.W. 701.

¹⁰⁵ *State v. Barberi* (1896) 47 N.Y. Supp. 168, quoting the Court of Appeals. With this view may be compared the following statement of Dr. Ernest Bryant Hoag, a distinguished psychiatrist: "The statement of

It should be noticed, however, that most of these statements were made before the beginning of the present century, when the science of psychiatry, even now still in its infancy, had hardly been born. And even at that time, not all courts looked upon the medical witness with such distrust. As early as 1844, Chief Justice Shaw had said that the opinions of persons of great experience, in whose correctness and sobriety of judgment confidence can be had, are "of great weight," although those of inexperienced persons, with crude and visionary notions, are not.¹⁰⁶ The Rhode Island court has held that uncontradicted expert testimony, relating as it does to a subject peculiarly within the knowledge of men skilled in that subject, must be taken as controlling.¹⁰⁷

§2. NON-EXPERT TESTIMONY

The Rule Stated. The admissibility of opinions by non-ex-

the village cobbler, blacksmith, carpenter, or constable to the effect that he did not believe a certain person had tuberculosis or syphilis, would have no weight as evidence against the positive statement to the contrary by a competent physician. Such is not the case in deciding the much more difficult problem about the very complex and often obscure disease—insanity. In such cases any person may, and often does, express his opinion, and the very bulk of such testimony carries great weight with the jury. It is a common, although hardly an elevating spectacle, at murder trials, to see whole groups of incompetent persons who have been associated with the accused, and representing all degrees of intelligence, delinquency, and criminality, give their testimony and state their opinions about a prisoner's mental condition. The unreliability of these witnesses is plainly evidenced by the fact that they often include other prisoners, prison guards of inferior ability, and in fact any person, no matter how incompetent, who may have observed the accused. Yet the courts accept such testimony, including the word and opinion of men whose lack of integrity is indicated by their incarceration, and upon a subject requiring high expert knowledge and unimpeachable honesty." Hoag and Williams, *Crime, Abnormal Minds and the Law* (1923), p. 102.

¹⁰⁶ *Comm. v. Rogers* (1844) 7 Metc. (Mass.) 500.

¹⁰⁷ *Sherman, Petitioner* (1891) 17 R.I. 356, 22 Atl. 276; *Palmer, Petitioner* (1904) 26 R.I. 486, 492, 59 Atl. 746.

perts, like those of experts, is subject to the same rules in criminal as in civil cases. At common law and in all American states¹⁰⁸ except Massachusetts, Maine, and New York, lay witnesses

¹⁰⁸ *United States*: *Queenan v. Oklahoma* (1902) 190 U.S. 548, 23 Sup. Ct. 762, 47 L. Ed. 1175; *Matheson v. U.S.* (1912) 227 U.S. 540, 33 Sup. Ct. 355, 57 L. Ed. 631; *Alabama*: *Norris v. State* (1849) 16 Ala. 776; *Ford v. State* (1882) 71 Ala. 385; *Parsons v. State* (1886) 81 Ala. 577, 2 So. 854; *Yarbrough v. State* (1894) 105 Ala. 43, 16 So. 758; *Caddell v. State* (1900) 129 Ala. 57, 36 So. 76; *Parrish v. State* (1903) 139 Ala. 16, 30 So. 1012; *Braham v. State* (1904) 143 Ala. 28, 38 So. 919; *James v. State* (1910) 167 Ala. 14, 52 So. 840; *Arkansas*: *Shaeffer v. State* (1895) 61 Ark. 241, 32 S.W. 679; *Schuman v. State* (1913) 106 Ark. 362, 153 S.W. 611; *Dewein v. State* (1915) 120 Ark. 302, 179 S.W. 346; *Woodall v. State* (1921) 149 Ark. 33, 231 S.W. 186; *California*: *People v. Lane* (1894) 101 Cal. 513, 36 Pac. 16; *People v. Estes* (1922) 188 Cal. 511, 206 Pac. 52 (limited to "intimate acquaintances"; see *post*, p. 23); *Colorado*: *Turley v. People* (1923) 73 Colo. 518, 216 Pac. 536; *District of Columbia*: *Taylor v. U.S.* (1895) 7 App. D.C. 27; *Shaffer v. U.S.* (1904) 24 App. D.C. 417; *Florida*: *Armstrong v. State* (1892) 30 Fla. 170, 11 So. 618; *Leaptrot v. State* (1906) 51 Fla. 57, 40 So. 616; *Scott v. State* (1912) 64 Fla. 490, 60 So. 355; *Hall v. State* (1919) 78 Fla. 420, 83 So. 513; *Georgia*: *Ryder v. State* (1897) 100 Ga. 528, 28 S.E. 246; *Graham v. State* (1897) 102 Ga. 650, 29 S.E. 582; *Yates v. State* (1906) 127 Ga. 813, 56 S.E. 1017; *Strickland v. State* (1911) 137 Ga. 115, 72 S.E. 922; *Harris v. State* (1923) 155 Ga. 405, 117 S.E. 460; *Idaho*: *State v. Hurst* (1895) 4 Ida. 345, 39 Pac. 554; *State v. Larkins* (1897) 5 Ida. 200, 47 Pac. 945; *State v. Shuff* (1903) 9 Ida. 115, 72 Pac. 664; *Illinois*: *Upstone v. People* (1883) 109 Ill. 169; *Jamison v. People* (1893) 145 Ill. 357, 34 N.E. 486; *People v. Phipps* (1915) 268 Ill. 210, 109 N.E. 25; *People v. Krauser* (1925) 315 Ill. 485, 146 N.E. 593; *Indiana*: *State ex rel. Nave v. Newlin* (1879) 69 Ind. 108; *Colee v. State* (1881) 75 Ind. 511; *Sage v. State* (1883) 91 Ind. 141; *Goodwin v. State* (1884) 96 Ind. 550; *Grubb v. State* (1888) 117 Ind. 277, 20 N.E. 257, 725; *Blume v. State* (1899) 154 Ind. 343, 56 N.E. 771; *Iowa*: *State v. Kilduff* (1913) 160 Ia. 388, 141 N.W. 962; *State v. Thomas* (1915) 172 Ia. 485, 154 N.W. 768; *State v. Maupin* (1923) 196 Ia. 904, 192 N.W. 828; *Kansas*: *State v. Rumble* (1909) 81 Kans. 16, 105 Pac. 1; *Kentucky*: *Brown v. Comm.* (1878) 77 Ky. 398; *Abbott v. Comm.* (1900) 107 Ky. 624, 55 S.W. 196; *Maulding v. Comm.* (1916) 172 Ky. 370, 189 S.W. 251; *Feree v. Comm.* (1922) 193 Ky. 347, 236 S.W. 246; *Louisiana*: *State v. Smith* (1902) 106 La. 33, 30 So. 248; *State v. Lyons* (1904) 113 La. 959, 37 So. 890; *State v. Genna* (1927) 163 La. 701, 112 So. 655; *Maryland*: *Watts v. State* (1904) 99 Md. 30, 57 Atl. 542; *Michigan*: *People v. Borgetto* (1894) 99 Mich. 336,

sufficiently acquainted with a person whose sanity is in issue to form an intelligent opinion on the matter, may testify to that opinion. In a number of these states, the witness must precede

58 N.W. 328; *Mississippi*: Wood v. State (1881) 58 Miss. 741; Reed v. State (1884) 62 Miss. 405; Baird v. State (1927) 146 Miss. 547, 112 So. 705; *Missouri*: Baldwin v. State (1848) 12 Mo. 223; State v. Klinger (1870) 46 Mo. 224; State v. Erb (1881) 74 Mo. 199; State v. Bryant (1887) 93 Mo. 273, 6 S.W. 102; State v. Williamson (1891) 106 Mo. 162, 17 S.W. 172; State v. Crisp (1895) 126 Mo. 605, 29 S.W. 699; State v. Bronstine (1898) 147 Mo. 520, 49 S.W. 512; State v. Soper (1899) 148 Mo. 217, 49 S.W. 1007; State v. Cockriel (1926) 314 Mo. 699, 285 S.W. 440; *Montana*: State v. Penna (1907) 35 Mont. 535, 90 Pac. 787; State v. Berberick (1909) 38 Mont. 423, 100 Pac. 209; State v. Schlaps (1927) 78 Mont. 560, 254 Pac. 858 (limited to "intimate acquaintances"; see p. 231); *Nebraska*: Schlencker v. State (1879) 9 Neb. 241, 1 N.W. 857; Polin v. State (1883) 14 Neb. 540, 16 N.W. 898; Bothwell v. State (1904) 71 Neb. 747, 99 N.W. 669; Reed v. State (1906) 75 Neb. 509, 106 N.W. 649; Shellenberger v. State (1914) 97 Neb. 498, 150 N.W. 643; Maddox v. State (1922) 108 Neb. 809, 189 N.W. 398; *Nevada*: State v. Lewis (1889) 20 Nev. 333, 22 Pac. 241; *New Hampshire*: State v. Hause (1925) 82 N.H. 133, 130 Atl. 743; *New Jersey*: Genz v. State (1896) 58 N.J.L. 482, 34 Atl. 816; *North Carolina*: State v. Potts (1888) 100 N.C. 457, 6 S.E. 657; State v. Banner (1908) 149 N.C. 519, 63 S.E. 84; State v. Journegan (1923) 185 N.C. 700, 117 S.E. 27; *North Dakota*: State v. Barry (1903) 11 N.D. 428, 92 N.W. 809; *Ohio*: Clark v. State (1843) 12 Ohio Rep. 483; Rucker v. State (1928) 119 Ohio 189, 162 N.E. 802; *Oklahoma*: Almerigi v. State (1920) 17 Okla. Crim. 458, 188 Pac. 1094; McNeill v. State (1920) 18 Okla. Crim. 1, 192 Pac. 256; *Oregon*: State v. Murray (1884) 11 Ore. 413, 5 Pac. 55; State v. Hansen (1894) 25 Ore. 391, 35 Pac. 976; State v. Fiester (1897) 32 Ore. 254, 50 Pac. 561; State v. Grayson (1928) 126 Ore. 560, 270 Pac. 404; *Pennsylvania*: Comm. v. Cavalier (1925) 284 Pa. 311, 131 Atl. 229; Comm. v. Winter (1927) 289 Pa. 284, 137 Atl. 261; *South Dakota*: State v. Leehman (1891) 2 S. Dak. 171, 49 N.W. 3; *Tennessee*: Dove v. State (1872) 50 Tenn. 348; Wilcox v. State (1894) 94 Tenn. 106, 28 S.W. 312; *Texas*: Thomas v. State (1874) 40 Tex. 60; Holcomb v. State (1874) 41 Tex. 125; McClackey v. State (1878) 5 Tex. App. 320; Webb v. State (1879) 5 Tex. App. 596, 608; Harris v. State (1885) 18 Tex. App. 287; McLeod v. State (1892) 31 Tex. Crim. 331, 20 S.W. 749; Adams v. State (1895) 34 Tex. Crim. 470, 31 S.W. 372; Williams v. State (1897) 37 Tex. Crim. 348, 39 S.W. 687; Cannon v. State (1900) 41 Tex. Crim. 467, 56 S.W. 351; Betts v. State (1905) 48 Tex. Crim. 522, 89 S.W. 413; Wells v. State (1906) 50 Tex. Crim. 499, 98 S.W. 851; Fults v. State (1906) 50 Tex. Crim. 502, 98

or accompany his opinion with a statement of the facts and circumstances upon which it is founded.¹⁰⁹

Laymen are allowed to state their opinions as to another's mental condition for the reason that it is impossible for a witness to detail only the facts and actions which indicate sanity or insanity, without stating his opinions or conclusions. A witness may from his acquaintance and observance of a certain person, feel convinced of his sanity or insanity, and yet not be able to remember all or even many of the incidents which led him to that conclusion. Even if he could remember them all, it is impossible for a witness to describe them without including conclusions.

Contrary Rule: Lay Opinion not Admissible. Massachusetts, Maine, and New York stand committed to the rule that non-experts may not testify to opinions regarding another's sanity or insanity.¹¹⁰ The reason for this view is the principle that opinion

S.W. 1057; *Jordan v. State* (1911) 64 Tex. Crim. 187, 141 S.W. 786; *Maxey v. State* (1912) 66 Tex. Crim. 234, 145 S.W. 952; *Plummer v. State* (1920) 86 Tex. Crim. 487, 218 S.W. 499; *Gardener v. State* (1921) 90 Tex. Crim. 339, 235 S.W. 897; *Thomas v. State* (1924) 98 Tex. Crim. 428, 266 S.W. 147; *Shields v. State* (1926) 104 Tex. Crim. 253, 283 S.W. 844; *Langhorn v. State* (1926) 105 Tex. Crim. 470, 289 S.W. 57; *Malone v. State* (1930) 115 Tex. Crim. 94, 30 S.W. (2d) 486; *Utah: In re Christensen* (1898) 17 Utah 412, 53 Pac. 1003; *Vermont: State v. Hayden* (1878) 51 Vt. 296; *Rogers v. State* (1905) 77 Vt. 454, 61 Atl. 489; *Washington: State v. Brooks* (1892) 4 Wash. 328, 30 Pac. 147; *State v. Constantine* (1908) 48 Wash. 218, 93 Pac. 317; *State v. Craig* (1909) 52 Wash. 66, 100 Pac. 167; *West Virginia: State v. Price* (1922) 92 W. Va. 542, 115 S.E. 393; *State v. Toney* (1925) 98 W. Va. 236, 127 S.E. 35; *Wisconsin: Yanke v. State* (1881) 51 Wis. 464, 8 N.W. 276; *Hempton v. State* (1901) 111 Wis. 127, 86 N.W. 506; *Duthey v. State* (1907) 131 Wis. 178, 111 N.W. 222; *Wyoming: Flanders v. State* (1916) 24 Wyo. 81, 156 Pac. 39, 1121.

¹⁰⁹ See *post*, p. 233.

¹¹⁰ *Maine: Wyman v. Gould* (1859) 47 Me. 159; *Fayette v. Chesterville* (1885) 77 Me. 28; *Massachusetts: Comm. v. Wilson* (1854) 67 Mass. 337; *Comm. v. Fairbanks* (1861) 84 Mass. 511; *Comm. v. Brayman* (1884) 136 Mass. 438; *Comm. v. Spencer* (1912) 212 Mass. 438, 99 N.E. 266; *New York: O'Brien v. People* (1867) 36 N.Y. 276; *Real v. People* (1870) 42

is not evidence.¹¹¹ The New Hampshire court in early cases followed the Massachusetts precedents, but in 1875 reversed itself,¹¹² and adopted the view of Judge Doe's dissenting opinion in *Boardman v. Woodman*,¹¹³ perhaps the leading judicial discussion of the subject. Oklahoma in an early case¹¹⁴ adopted the New York rule, but seems now to have abandoned it, and to admit non-expert opinions.¹¹⁵

The three states excluding non-expert opinions have in recent times tried to limit their rule, and have drawn some fine-spun distinctions between what a layman may testify to and what he may not. In Massachusetts, it has been held that a non-expert may state that a defendant has "failed" mentally,¹¹⁶ or that the witness has never noticed anything unusual, or anything indicating that the defendant was of unsound mind.¹¹⁷ In Maine, also, it is held that a non-expert may testify that "he observed nothing peculiar."¹¹⁸ In New York, while a non-expert may not testify to an opinion that the defendant is "sane" or "insane," he

N.Y. 270; *People v. Conroy* (1884) 97 N.Y. 62; *People v. Packenham* (1889) 115 N.Y. 200, 21 N.E. 1035; *People v. Taylor* (1893) 138 N.Y. 398, 34 N.E. 275; *People v. Strait* (1896) 148 N.Y. 566, 42 N.E. 1045; *People v. Koerner* (1897) 154 N.Y. 355, 48 N.E. 730; *People v. Truck* (1902) 170 N.Y. 203, 63 N.E. 281; *People v. Spencer* (1904) 179 N.Y. 408, 72 N.E. 461; *People v. Silverman* (1905) 181 N.Y. 235, 73 N.E. 980; *People v. Pekarz* (1906) 185 N.Y. 470, 78 N.E. 294.

¹¹¹ Dean Wigmore has pointed out the error of this notion, distorting as it does the correct rule that *mere* opinion (i.e., opinion not resting on observed data) is not evidence, into this entirely different and erroneous rule that opinion is not evidence. Wigmore, *Evid.* (2d ed., 1923), vol. iv, p. 127.

¹¹² *Hardy v. Merrill*, 56 N.H. 227.

¹¹³ (1866) 47 N.H. 120, 144.

¹¹⁴ *Queenan v. Terr.* (1901) 11 Okla. 261, 71 Pac. 218. *Accord*: *Bell v. State* (1917) 14 Okla. Crim. 167, 168 Pac. 827.

¹¹⁵ *Almerigi v. State* (1920) 17 Okla. Crim. 458, 463, 188 Pac. 1094; *McNeill v. State* (1920) 18 Okla. Crim. 1, 192 Pac. 256; *Lee v. State* (1925) 30 Okla. Crim. 14, 234 Pac. 654.

¹¹⁶ *Comm. v. Brayman* (1884) 136 Mass. 438.

¹¹⁷ *McCoy v. Jordan* (1904) 184 Mass. 575, 69 N.E. 358.

¹¹⁸ *Fayette v. Chesterville* (1885) 77 Me. 28, 33.

one who is not an intimate acquaintance may testify to the defendant's "appearance" at particular times, and may state whether he appeared rational, excited, morose, etc.¹²⁸ Courts in which no such statutes exist have also in a few cases said that the witness must be an intimate acquaintance;¹²⁹ but others have held that there is no such requirement, and that even a casual observer may notice facts which are valuable, and which should be admissible in evidence.¹³⁰

Psychiatrists have insisted that laymen are incompetent to form a sound judgment as to another's mental condition, even though they are intimate acquaintances.¹³¹ In a few cases, this view seems to be accepted,¹³² but such cases are rare. Even in the three states where non-expert opinion is excluded, the reason usually given is that opinion is not evidence, and not that the inquiry is one requiring expert knowledge, concerning which laymen are experientially unqualified to speak.

38 Mont. 423, 100 Pac. 209; *State v. Schlaps* (1927) 78 Mont. 560, 254 Pac. 858; *State v. Hassing* (1911) 60 Ore. 81, 118 Pac. 195; *State v. Peare* (1925) 113 Ore. 441, 449, 233 Pac. 256; *State v. Grayson* (1928) 126 Ore. 560, 270 Pac. 404.

¹²⁸ *People v. McCarthy* (1896) 115 Cal. 255, 46 Pac. 1073; *People v. Arrighini* (1898) 122 Cal. 121, 54 Pac. 591; *People v. Manoogian* (1904) 141 Cal. 592, 75 Pac. 177.

¹²⁹ "A person who sees a man only a few times and who has no intimate acquaintance or long association with him, is not qualified to express the opinion that the man is of unsound mind merely because on occasions he did or said something, or failed to do or say something, that in his opinion a man of good intelligence and sound might have done or said or would not have done or said." *Maulding v. Comm.* (1916) 172 Ky. 370, 189 S.W. 251. And see *In re Christensen* (1898) 17 Utah 412, 53 Pac. 1003.

¹³⁰ *Grubb v. State* (1888) 117 Ind. 277, 20 N.E. 257, 725 (witness who had talked with defendant ten or fifteen minutes on one occasion held competent to give opinion of his sanity at that time); *State v. Rumble* (1909) 81 Kans. 16, 105 Pac. 1.

¹³¹ See, for example, the quotation from Dr. Ernest Bryant Hoag, p. 224.

¹³² *U.S. v. Holmes* (1858) 1 Cliff. 98, 104, 106; *Fayette v. Chesterville* (1885) 77 Me. 28; *May v. Bradlee* (1879) 127 Mass. 414, 421.

Limitations on Non-Expert Opinion: 1. Stating Facts on Which Opinion is Based. In about twelve of the states where lay witnesses are allowed to state their opinions of another's sanity or insanity, the courts hold that the witness must not only show sufficient opportunity to observe the person to form an intelligent opinion, but also that he must state the particular facts and circumstances which he has observed and upon which he bases his opinion.¹³³ Three more states have established the

¹³³ *Arkansas*: Opinions of non-experts are admissible only "after a showing of their association with him and their opportunity for observation and a statement of facts upon which their opinions were based." *Schuman v. State* (1913) 106 Ark. 362, 153 S.W. 611; *Dewein v. State* (1915) 120 Ark. 302, 179 S.W. 346; *Davis v. State* (1930) 182 Ark. 123, 32 S.W. (2d) 1691. Exclusion of opinion of witness who had not sufficiently detailed the facts on which the opinion was based was held correct. *Woodall v. State* (1921) 149 Ark. 33, 231 S.W. 186. *Idaho*: *State v. Shuff* (1903) 9 Ida. 115, 72 Pac. 664 (*dictum* that non-experts "are required to state the facts upon which they base their opinions, and from the facts, perhaps more than the opinions of the witnesses, the jurors form their conclusions"). *Illinois*: *People v. Phipps* (1915) 268 Ill. 210, 109 N.E. 25 ("Where the purpose is to prove unsoundness of mind, an objection is properly sustained to a question which calls for the opinion of the witness as to the mental condition without first eliciting the facts and circumstances upon which such opinion is based"); *People v. Krauser* (1925) 315 Ill. 485, 509, 146 N.E. 593 (error to permit witness who had observed defendant for several hours to testify to opinion that he was sane, without requiring him to state facts on which he based his opinion). *Indiana*: Not clear whether particular facts must be stated, or whether opportunity to observe is sufficient. *Goodwin v. State* (1884) 96 Ind. 550; *Grubb v. State* (1888) 117 Ind. 277, 20 N.E. 257, 725 (holding defendant's father could not give opinion of insanity, because he had stated no facts upon which to base the opinion); *Lawson v. State* (1908) 171 Ind. 431, 84 N.E. 974. *Maryland*: *Watts v. State* (1904) 99 Md. 30, 57 Atl. 542. *Oklahoma*: *Lee v. State* (1925) 30 Okla. Crim. 14, 234 Pac. 654 ("Mere conclusions of the witness, based upon observation, without a showing of fact from which such conclusions may logically be drawn, are insufficient"). *Tennessee*: *Atkins v. State* (1907) 119 Tenn. 458, 105 S.W. 353 (not clear whether this case requires witness to state the particular facts and conduct observed, or only to show that "he has had the means of observation"). *Texas*: *Epps v. State* (1928) 110 Tex. Crim. 406, 10 S.W. (2d) 566. *Vermont*: *Rogers v.*

same rule by statute.¹³⁴ In eight or nine other states, the facts and circumstances are required to be detailed if the witness is to testify to an opinion that the person is insane; but an opinion that the person is sane may be given without relating particular actions, conduct, or circumstances.¹³⁵ The reason given for this distinction is that opinions of insanity are usually formed from strange or unusual actions or conduct, but an opinion that the person is sane is generally based simply on the absence of any

State (1905) 77 Vt. 454, 61 Atl. 489 (statement of the facts observed is essential to the admissibility of an opinion of sanity or insanity). *Washington*: State v. Brooks (1892) 4 Wash. 328, 30 Pac. 147; State v. Wilkins (1930) 156 Wash. 456, 287 Pac. 23; State v. Schneider (1930) 158 Wash. 504, 291 Pac. 1093. *Wisconsin*: Seems to require opinion to be accompanied by statement of the facts heard and seen. *Yanke v. State* (1881) 51 Wis. 464, 468, 8 N.W. 276; *Duthey v. State* (1907) 131 Wis. 178, 111 N.W. 222. *Wyoming*: *Flanders v. State* (1916) 24 Wyo. 81, 156 Pac. 39 ("unsupported opinions" not admissible; must be founded on facts; but it is not clear whether by "facts" is meant particular incidents, or only that sufficient acquaintance and knowledge be shown to justify an opinion).

¹³⁴ Evidence may be given of "the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given." Cal. Code of Civil Proc., §1870, par. 10; Mont. Rev. Code (1921), §10531, par. 10; Ore. Code (1930) §§9-226 (10). Under this provision, the Oregon court has said, the inquiry should be "first whether the witness is acquainted with the person, and the character of the acquaintance. Second, what the opinion of the witness is respecting the mental sanity of the person: and third, the witness' reason for his opinion. The reason may be based upon the peculiar appearance of the person, his change of demeanor, the strange manner of his conversation, or any other singular feature he exhibits." *State v. Murray* (1884) 11 Ore. 413, 5 Pac. 55. *Accord*: *State v. Grayson* (1928) 126 Ore. 560, 270 Pac. 404.

¹³⁵ *Yarbrough v. State* (1894) 105 Ala. 43, 16 So. 758; *Caddell v. State* (1900) 129 Ala. 57, 30 So. 76; *Parrish v. State* (1903) 139 Ala. 16, 36 So. 1012; *Fondren v. State* (1920) 204 Ala. 451, 86 So. 71; *State v. Kilduff* (1913) 160 Ia. 388, 394, 141 N.W. 962; *State v. Thomas* (1915) 172 Ia. 485, 154 N.W. 768; *State v. Maupin* (1923) 196 Ia. 904, 909, 192 N.W. 828; *State v. Lyons* (1904) 113 La. 959, 37 So. 890; *People v. Borgetto* (1894) 99 Mich. 336, 58 N.W. 328; *Baird v. State* (1927) 146 Miss. 547, 112 So. 705; *State v. Soper* (1899) 148 Mo. 217, 235, 49 S.W. 1007; *State v. Liolios* (1920) 285 Mo. 1, 13, 225 S.W. 941; *State v. Cockriel* (1926) 314 Mo. 699,

unusual behavior. It is therefore sufficient for the witness simply to testify that he has known and observed the person, has never noticed anything unusual about him, and that in the witness' opinion he is sane.¹³⁶

This requirement that the witness must detail the facts and particular incidents upon which he bases his opinion has been criticized by Wigmore as unsound.

In the first place, then, there is no principle and no orthodox practice which requires a witness having personal observation to state in advance his observed data before he states his inferences from them; all that needs to appear in advance is that he had an opportunity to observe and did observe, whereupon it is proper for him to state his conclusions, leaving the detailed grounds to be drawn out on cross-examination. . . . Any other rule cumbers seriously the examination, and amounts in effect to changing substantially the whole examination into a "voir dire,"—an innovation on established methods which is unwarranted by policy. Secondly, if the rule were good, it would be as necessary for the expert witness as for the lay witness. Thirdly, no justification for it seems ever to have been attempted; it is simply an instance of traditions misunderstood.¹³⁷

The rule has been expressly rejected in a few states.¹³⁸ In a

713, 285 S.W. 440; *Wilson's Estate* (1907) 78 Neb. 758, 111 N.W. 788; *Torske v. State* (1932) 123 Neb. 161, 242 N.W. 408; *Comm. v. Cavalier* (1925) 284 Pa. 311, 131 Atl. 229; *Carmickle v. State* (1925) 101 Tex. Crim. 94, 274 S.W. 136; *Shields v. State* (1926) 104 Tex. Crim. 253, 283 S.W. 844; *Langhorn v. State* (1926) 105 Tex. Crim. 470, 289 S.W. 57.

¹³⁶ *State v. Kilduff* (1913) 160 Ia. 388, 394, 141 N.W. 962; *State v. Lyons* (1904) 113 La. 959, 37 So. 890; *People v. Borgetto* (1894) 99 Mich. 336, 58 N.W. 328; *Davis v. State* (1930) 161 Tenn. 23, 28 S.W. (2d) 993.

¹³⁷ Wigmore, *Evid.* (2d ed., 1923), vol. iv, §1922, p. 117.

¹³⁸ *State v. Rumble* (1909) 81 Kans. 16, 19, 105 Pac. 1 (adopting Wigmore's view, quoted above); *Brown v. Comm.* (1878) 77 Ky. 398; *Massie v. Comm.* (1894) 15 Ky. Law Rep. 562, 24 S.W. 611; *Cottrell v. Comm.* (1891) 13 Ky. Law Rep. 305, 17 S.W. 149 ("It is well settled in this state that the opinions of those who speak from acquaintance with and actual knowledge of a person are admissible as evidence of his mental capacity or

number of others, it is not required in practice, although the question has never been decided in the upper courts.¹³⁹

2. *Opinions as to Responsibility.* Another restriction, applied in one or two states, concerns opinions as to defendant's knowledge of right and wrong. It is incompetent, of course, to ask a witness whether the defendant was "responsible" for the crime charged,¹⁴⁰ for responsibility depends upon a legal definition. One or two states further hold that the witness may not be asked whether the accused knew right from wrong,¹⁴¹ or was acting

incapacity, although they may give no particular circumstances in support of their belief"); *State v. Lewis* (1889) 20 Nev. 333, 22 Pac. 241 ("There are many cases where the mental condition of a person depends as much, or more, upon his looks and gestures, connected with his acts, conduct, or conversation, as upon the words and actions themselves; and it would often be difficult, and sometimes impossible, for the witness to intelligently give all the details upon which his opinion is based"). The Georgia court has held that a witness who had observed and conversed with the defendant might testify to an opinion that he is insane, without detailing the facts on which it is based. *Strickland v. State* (1911) 137 Ga. 115, 72 S.E. 922. This case virtually overruled an earlier case holding that a non-expert cannot state an opinion without stating the facts on which it is based. *Welch v. Stipe* (1894) 95 Ga. 762, 22 S.E. 670. And the Mississippi court has said that "the qualification that the opinion of the non-expert must be accompanied by a statement of the facts on which it is based is not very important; since, whether the witness be an expert or a non-expert, the grounds of his belief and his opportunities of observation may always be elicited." *Wood v. State* (1881) 58 Miss. 741.

¹³⁹ *Wigmore, op. cit.*, vol. iv, §1933, p. 131.

¹⁴⁰ *Goodwin v. State* (1884) 96 Ind. 550; *State v. McGruder* (1904) 125 Ia. 741, 101 N.W. 646; *People v. Thurston* (1852) 2 Park. Crim. Rep. (N.Y.) 49, 134.

¹⁴¹ The Missouri court has held that even an expert may not state an opinion as to whether the accused was capable of judging between right and wrong. *State v. Palmer* (1901) 161 Mo. 152, 61 S.W. 651; *State v. Brown* (1904) 181 Mo. 192, 79 S.W. 1111. It seems certain, therefore, that a non-expert cannot give such an opinion in the Missouri courts. In Nebraska the cases are conflicting. In *Shults v. State* (1893) 37 Neb. 481, 497, 55 N.W. 1080, it was held that a non-expert may not state an opinion that the defendant was incapable of distinguishing right from wrong; but this was overruled in *Pflueger v. State* (1895) 46 Neb. 493, 501, 64

under an irresistible impulse, or a delusion,¹⁴² these being questions for the jury. But in the great majority of states, opinions as to the defendant's capacity to distinguish right from wrong are admitted without question,¹⁴³ or are expressly held admissible.¹⁴⁴

§3. ADMISSIBILITY OF EVIDENCE

In General: Kinds of Facts Which Tend to Show Mental Condition. In addition to the opinion evidence of experts and laymen, a defendant's mental condition may be proved by circumstantial evidence. Such evidence, says Professor Wigmore, is of three classes: "(1) the person's outward conduct, manifesting the inward and causing condition; (2) pre-existing external circumstances, tending to produce a special mental condition; and (3) the prior or subsequent existence of the condition, from which its existence at the time in question may be inferred."¹⁴⁵

N.W. 1094, holding that such opinions are admissible. The Pflueger Case was followed in *McCormick v. State* (1902) 66 Neb. 337, 92 N.W. 606. But in *Reed v. State* (1906) 75 Neb. 509, 106 N.W. 649, the court refused to permit such an opinion, and cited the Shults Case, but not *Pflueger v. State*.

¹⁴² *Patterson v. State* (1890) 86 Ga. 70, 12 S.E. 174.

¹⁴³ Only a few of the cases in which opinions as to capacity to distinguish right and wrong were admitted without discussion are here given: *Davis v. U.S.* (1896) 165 U.S. 373, 17 Sup. Ct. 360, 41 L. Ed. 750; *Shaeffer v. State* (1895) 61 Ark. 241, 32 S.W. 679; *Harris v. State* (1923) 155 Ga. 405, 117 S.E. 460; *State v. Cooper* (1915) 170 N.C. 719, 87 S.E. 50; *Giebel v. State* (1889) 28 Tex. App. 151, 12 S.W. 591; *Jordan v. State* (1911) 64 Tex. Crim. 187, 141 S.W. 786.

¹⁴⁴ *Powell v. State* (1854) 25 Ala. 21; *Smith v. State* (1891) 55 Ark. 259, 18 S.W. 237; *U.S. v. Guiteau* (1882) 12 D.C. (1 Mackey) 498, 546; *Hinson v. State* (1921) 152 Ga. 243, 109 S.E. 661; *State v. Porter* (1871) 34 Ia. 131, 137; *State v. McGruder* (1904) 125 Ia. 741, 101 N.W. 646; *Banks v. Comm.* (1911) 145 Ky. 800, 141 S.W. 380; *State v. Lewis* (1889) 20 Nev. 333, 22 Pac. 241; *State v. Lechman* (1891) 2 S.D. 171, 49 N.W. 3; *Carr v. State* (1888) 24 Tex. App. 562, 7 S.W. 328; *Ford v. State* (1899) 40 Tex. Crim. 280, 50 S.W. 350.

¹⁴⁵ Wigmore, *Evid.* (2d ed., 1923), vol. i, §227.

1. *Conduct.* The normality or abnormality of the operation of a person's mind, says Professor Wigmore, can only be ascertained by watching the effects through a multifold series of causes. "On the one hand, no single act can be of itself decisive; while on the other hand, any act whatever may be significant to some extent. . . . The first and fundamental rule, then, will be that *any and all conduct* of the person is admissible in evidence. There is no restriction as to the kind of conduct. There can be none; for if a specific act does not indicate insanity it may indicate sanity."¹⁴⁶ This statement represents the law in many states,¹⁴⁷ and it is the general rule today that the acts, conduct, and declarations of the defendant, both prior and subsequent to the act charged, as well as at the time of its commission, are admissible to show his mental condition at the time of the act.¹⁴⁸ A few courts have worded the rule more cautiously than

¹⁴⁶ Wigmore, *Evid.* (2d ed., 1923), vol. i, §228.

¹⁴⁷ *Guiteau's Case* (1882) 10 Fed. 161; *Howard v. State* (1911) 172 Ala. 402, 55 So. 255; *Anderson v. State* (1922) 209 Ala. 36, 95 So. 171; *Groce v. Terr.* (1908) 12 Ariz. 1, 94 Pac. 1108; *Bolling v. State* (1891) 54 Ark. 588, 16 S.W. 658; *Green v. State* (1894) 59 Ark. 246, 27 S.W. 5; *Bulger v. State* (1915) 60 Colo. 165, 151 Pac. 937; *State v. Wright* (1900) 112 Ia. 436, 442, 84 N.W. 541; *Smith v. State* (1909) 95 Miss. 786, 49 So. 945; *State v. Warren* (1927) 317 Mo. 843, 852, 297 S.W. 397; *State v. Tarwater* (1921) 293 Mo. 273, 293, 239 S.W. 480; *State v. Driggers* (1909) 84 S.C. 526, 66 S.E. 1042; *Witty v. State* (1914) 75 Tex. Crim. 440, 171 S.W. 229; *Epps v. State* (1928) 110 Tex. Crim. 406, 10 S.W. (2d) 566.

¹⁴⁸ *U.S. v. Holmes* (1858) 1 Cliff. 98, 110; *Cawley v. State* (1902) 133 Ala. 128, 32 So. 227; *Gilbert v. State* (1911) 172 Ala. 386, 56 So. 136; *Russell v. State* (1918) 201 Ala. 572, 78 So. 916; *Anderson v. State* (1922) 209 Ala. 36, 95 So. 171; *Birchfield v. State* (1928) 217 Ala. 225, 115 So. 297; *Flanagan v. State* (1898) 103 Ga. 619, 30 S.E. 550; *State v. Hays* (1870) 22 La. Ann. 39; *State v. Scott* (1897) 49 La. Ann. 253, 21 So. 271; *State v. Lyons* (1904) 113 La. 959, 983, 37 So. 890; *Russell v. State* (1876) 53 Miss. 367; *State v. Jones* (1871) 50 N.H. 369; *State v. Calloway* (1922) 92 Tex. Crim. 506, 244 S.W. 549; *State v. Kellum* (1922) 91 Tex. Crim. 272, 238 S.W. 940; *Epps v. State* (1928) 110 Tex. Crim. 406, 10 S.W. (2d) 566; *French v. State* (1896) 93 Wis. 325, 67 N.W. 706; *Oborn v. State* (1910) 143 Wis. 249, 267, 126 N.W. 737.

has Professor Wigmore, saying that the defendant's acts and conduct a reasonable time before and after the act are admissible, if they tend to throw light upon his mental condition at the time of the act;¹⁴⁹ or that such prior and subsequent conduct is not admissible as a matter of course, but that its admissibility rests in the sound discretion of the trial court.¹⁵⁰ In Massachusetts, while prior conduct seems to be admitted without question,¹⁵¹ conduct subsequent to the crime is held not to be admissible as a matter of course, but only in the discretion of the trial court; to be admitted, it should be shown either to be so connected with evidence of mental disorder preceding the offense as to strengthen the inference of continuance, and carry it by the time of the crime, or to be indicative of unsoundness of such degree as to have required a longer time than the interval between the crime and the time of its manifestation to develop.¹⁵² This view seems to be followed in Arkansas and Wisconsin.¹⁵³ Declarations made by the defendant subsequent to the crime were held by the older North Carolina cases not to be admissible, except as part of the *res gestae*,¹⁵⁴ but this view has since been overruled.¹⁵⁵ The Missouri court has held in a bizarre decision that neither prior nor subsequent acts or conduct of the defend-

¹⁴⁹ *People v. Willard* (1907) 150 Cal. 543, 89 Pac. 124; *People v. Harris* (1914) 169 Cal. 53, 145 Pac. 520; *State v. Price* (1922) 92 W. Va. 542, 560, 115 S.E. 393.

¹⁵⁰ *State v. Lechman* (1891) 2 S.D. 171, 49 N.W. 3; *State v. Crowe* (1909) 39 Mont. 174, 102 Pac. 579; *State v. Hansen* (1894) 25 Ore. 391, 35 Pac. 976, 36 Pac. 296.

¹⁵¹ *Comm. v. Spencer* (1912) 212 Mass. 438, 446, 99 N.E. 266.

¹⁵² *Comm. v. Pomeroy* (1875) 117 Mass. 148.

¹⁵³ *Bolling v. State* (1891) 54 Ark. 588, 16 S.W. 658; *French v. State* (1896) 93 Wis. 325, 67 N.W. 706; *Oborn v. State* (1910) 143 Wis. 249, 267, 126 N.W. 737.

¹⁵⁴ *State v. Scott* (1820) 1 Hawk (N.C.) 24; *State v. Vann* (1880) 82 N.C. 631. See also *Bass v. State* (1929) 219 Ala. 282, 122 So. 45.

¹⁵⁵ *McLeary v. Normont* (1881) 84 N.C. 235; *State v. Cooper* (1915) 170 N.C. 719, 87 S.E. 50.

ant are admissible, giving as a reason that the only question at issue is his condition at the time of the act.¹⁵⁶

Since there is practically no limitation on the kind of conduct which may be shown in evidence, it is scarcely worth while to enumerate at length the multitude of facts which have been held admissible. Acts and incidents prior to the crime, as that he was a truant when young,¹⁵⁷ had "spells,"¹⁵⁸ claimed to be a detective,¹⁵⁹ and even that he had an inordinate appetite,¹⁶⁰ have been admitted in evidence. The coolness with which the crime was committed,¹⁶¹ the atrocity of the deed,¹⁶² and lack of motive¹⁶³

¹⁵⁶ *State v. Morris* (1914) 263 Mo. 339, 172 S.W. 603 (evidence of defendant's mental condition for three years preceding the offense, and the evening thereafter, held inadmissible). However, in *State v. Tarwater* (1921) 293 Mo. 273, 293, 239 S.W. 480, the Missouri Supreme Court said that "No limitation is fixed by law as to the time within which the inquiry as to the mental condition of accused is to be directed," but the facts should be restricted to those tending to show his mental condition at the time of the act charged, citing *State v. Morris, supra*, to support this rule.

¹⁵⁷ *People v. Haensel* (1920) 293 Ill. 33, 127 N.E. 181.

¹⁵⁸ *People v. Lowhone* (1920) 292 Ill. 32, 126 N.E. 620.

¹⁵⁹ *Lilly v. People* (1894) 148 Ill. 467, 36 N.E. 95.

¹⁶⁰ *People v. Ortiz* (1926) 320 Ill. 205, 150 N.E. 708.

¹⁶¹ *Hopps v. People* (1863) 31 Ill. 385 (but held that the state in rebuttal may prove that the defendant had been engaged in enterprises requiring coolness [here smuggling], to rebut the implication that this coolness at the time of the crime was attributable to insanity).

¹⁶² *People v. Spencer* (1914) 264 Ill. 124, 106 N.E. 219; *Sagu v. State* (1923) 94 Tex. Crim. 14, 248 S.W. 390. But the enormity of the crime is not conclusive proof of insanity. *Epps v. State* (1928) 110 Tex. Crim. 406, 10 S.W. (2d) 566. And in the absence of other evidence, atrocity does not of itself furnish any basis for the defense of insanity. *U.S. v. Lee* (1886) 15 D.C. 489; *Laros v. Comm.* (1877) 84 Pa. 200; *State v. Evans* (1923) 94 W. Va. 47, 117 S.E. 885.

¹⁶³ *People v. Smith* (1866) 31 Cal. 466; *Andersen v. State* (1876) 43 Conn. 514; *State v. Jack* (1903) 20 Del. (4 Pennewell) 470, 58 Atl. 833; *Goodwin v. State* (1884) 96 Ind. 550, 567; *State v. Spencer* (1846) 21 N.J.L. 196, 211; *State v. Ehlers* (1922) 98 N.J.L. 236, 119 Atl. 15; *Comm. v. Buccieri* (1893) 153 Pa. 535, 26 Atl. 228; *Sagu v. State* (1923) 94 Tex. Crim. 14, 248 S.W. 390. The California cases subsequent to *People v.*

are admissible as tending to show insanity. Hiding or attempted escape has been admitted as evidence of sufficient sanity to be conscious of guilt.¹⁸⁴ That the defendant feigned insanity is admissible for the same reason.¹⁸⁵ Letters written by him may be introduced as a basis for expert opinion of his sanity.¹⁸⁶ Likewise, an affidavit sworn to and subscribed by the defendant himself, asking for a continuance, has been held admissible as evidence that he was sane enough to make such affidavit.¹⁸⁷ Where the defendant has made a confession, confessions made by him to other crimes, later proved untrue, may be shown, as tending

Smith, *supra*, seem *contra*, however. Instructions have been given to juries in California that "a morbid and restless (but irresistible) thirst for blood would itself be a motive urging to such a deed for its own relief." *People v. Hoin* (1882) 62 Cal. 120; *People v. McCarthy* (1896) 115 Cal. 255, 46 Pac. 1073; *People v. Estes* (1922) 188 Cal. 511, 206 Pac. 52.

¹⁸⁴ "Flight from justice, and its analogous conduct, have always been deemed indicative of a consciousness of guilt." Wigmore, *Evid.* (2d ed., 1923), vol. i, §276. This general rule has been applied in cases where the defense was insanity. *Jamison v. People* (1893) 145 Ill. 357, 34 N.E. 486; *People v. Geary* (1921) 297 Ill. 608, 131 N.E. 97; *People v. Limeberry* (1921) 298 Ill. 355, 131 N.E. 691. In California, an instruction that flight tends to prove consciousness of guilt has been held not erroneous, though the only defense relied on was insanity. *People v. Easton* (1905) 148 Cal. 50, 82 Pac. 840. The later Missouri cases, on the other hand, have held that this presumption is one of fact only, and therefore is not a subject for comment by the court, and an instruction that flight raises a presumption of guilt is error. *State v. Hogan* (1923) 252 S.W. 387. This rule applies, of course, where the defense is insanity. *State v. Campbell* (1923) 301 Mo. 618, 257 S.W. 131 (holding that instruction that flight raised presumption of guilt was same as saying that it raised presumption of sanity, "because he could not be guilty unless he was sane when he committed the act").

¹⁸⁵ *Bass v. State* (1929) 219 Ala. 282, 122 So. 45; *Maxwell v. State* (1916) 146 Ga. 10, 90 S.E. 279.

¹⁸⁶ *Blume v. State* (1899) 154 Ind. 343, 56 N.E. 771; *Reed v. State* (1923) 23 Okla. Crim. 56, 212 Pac. 441.

¹⁸⁷ *Flanagan v. State* (1898) 103 Ga. 619, 30 S.E. 550. *Contra*: *People v. Scott* (1927) 326 Ill. 327, 157 N.E. 247 (defendant's affidavit for change of venue not admissible to be read to expert, as basis for an opinion regarding sanity).

to prove that he had an insane tendency to confess to crimes he did not commit.¹⁶⁸

Where particular conduct has been testified to, as evidence of insanity, the state may offer evidence explaining the conduct as not inconsistent with sanity. Thus, where certain peculiar actions had been testified to, it was held the state may show that the defendant was drunk on that occasion.¹⁶⁹ The prosecution may also prove that the particular peculiar acts testified to were not characteristic of defendant, and that ordinarily he acted like a normal person. All humans act irrationally at times, and if all the irrational acts which a certain person has committed are singled out, they may give an impression of marked abnormality. Accordingly, it has been held that whenever evidence of acts, conduct or declarations is introduced to prove the defendant insane, the prosecution may offer evidence of other acts, conduct and declarations during the same period, to show that he was sane, and that the irrational acts testified to were merely lapses into which most humans occasionally fall.¹⁷⁰

2. *Predisposing Circumstances.* It is known that certain facts sometimes cause or predispose to insanity. There are at least four classes of such facts: (1) circumstances which may produce moral or psychic stress or shock so as to unbalance the mind; (2) hereditary insanity; (3) bodily injuries or diseases which may affect the mind; and (4) the presence in the body of alcohol, drugs, poisons, or other substances likely to affect the mind. The existence of any such fact may be proved to substantiate the defense of insanity at the time of the act charged.

(1) Moral or psychic stress or shock may be produced by the knowledge or information of certain facts, and may have such pronounced effect as to unseat the reason. The most common

¹⁶⁸ *People v. Lowhone* (1920) 292 Ill. 32, 126 N.E. 620; *Shellenberger v. State* (1914) 97 Neb. 498, 150 N.W. 643.

¹⁶⁹ *People v. Miles* (1894) 143 N.Y. 383, 38 N.E. 456.

¹⁷⁰ *U.S. v. Holmes* (1858) 1 Cliff. 98, 109; *State v. Spangler* (1916) 92

fact of this kind found in the cases is the infidelity of defendant's wife, or misconduct on the part of the deceased toward defendant's wife. It is admissible to prove that the defendant had knowledge of any such fact,¹⁷¹ with certain limitations: (a) Since the important thing is the defendant's knowledge of the fact, and the effect of that knowledge on his mind, it is essential that he knew of the fact; misconduct of which he was ignorant therefore cannot be proved.¹⁷² (b) Whether his information was in fact true is immaterial, so long as he believed it to be true, or at least, entertained doubts and suspicions concerning its truth; accordingly, it is not permissible for him to

¹⁷¹ *Ragland v. State* (1899) 125 Ala. 12, 27 So. 983 (information that deceased had seduced defendant's daughter, received a few hours before the homicide); *People v. Haensel* (1920) 293 Ill. 33, 127 N.E. 181 (information of his wife's infidelity); *Abbott v. Comm.* (1900) 107 Ky. 624, 55 S.W. 196 (information that deceased had debauched defendant's sister, and that she had given birth to a child); *Choate v. Comm.* (1917) 176 Ky. 427, 195 S.W. 1080 (that his wife had been intimate with the victim of the assault); *People v. Bowen* (1911) 165 Mich. 231, 130 N.W. 706 (reports arousing suspicion or belief of infidelity of his wife, whom he had killed); *People v. Wood* (1891) 126 N.Y. 249, 27 N.E. 362 (report that deceased had raped defendant's wife); *State v. Green* (1910) 152 N.C. 835, 68 S.E. 16 (information that deceased had raped defendant's wife); *Steeley v. State* (1920) 17 Okla. Crim. 252, 187 Pac. 821 (that deceased had conducted himself immorally toward defendant's wife); *State v. Flanney* (1911) 61 Wash. 482, 112 Pac. 630 (that his wife, whom he was charged with murdering, had joined the Shakers, a sect practicing promiscuous intercourse); *State v. Albutt* (1917) 99 Wash. 253, 169 Pac. 584 (that defendant believed the assaulted party had aided in an attack on defendant's daughter).

Contra: *State v. Graviotte* (1870) 22 La. Ann. 587 (evidence that defendant had seen misconduct on the part of his wife, offered to show such mental excitement on the part of defendant as a result of what he had seen, as might be a predisposing cause of insanity, held properly rejected, the court saying, "Vague conjectures as to a probable existence of mental aberration from supposed predisposing causes are quite too sublimated to possess weight in the inquiry as to the sanity or insanity of an accused party").

¹⁷² *Choate v. Comm.* (1917) 176 Ky. 427, 195 S.W. 1080; *People v. Osmond* (1893) 138 N.Y. 80, 33 N.E. 739.

question" than that of ancestral mental disorder,¹⁸⁰ and it has even been held that evidence of collateral insanity is not relevant under the defense of insanity.¹⁸¹ But the generally accepted rule is that it is admissible to prove the existence of mental unsoundness in the defendant's collateral kinsmen, as well as among direct ancestors.¹⁸²

(3) Bodily injuries or diseases, such as blows on the head, injuries to the spine, epilepsy, syphilis, etc., may lead to mental disturbances, and it is therefore competent, where the issue of defendant's mental condition has been raised by evidence, to

appear that the disease [of defendant, or the relatives, or both?] is hereditary, or transmissible, so as to taint the family blood"); *State v. Price* (1922) 92 W. Va. 542, 115 S.E. 393 ("Ordinarily it is competent, where an attempt is made to prove that one is insane, to offer evidence of the insanity of his blood relatives, but to make such evidence pertinent there should be some showing of the nature and duration of the insanity of such relative or relatives, and there should also first be introduced some evidence tending in a substantial degree to prove that the person about whom the inquiry is being made is afflicted with insanity of an hereditary nature"); *State v. Fenik* (1923) 45 R.I. 309, 121 Atl. 218 (where there was evidence that defendant was suffering from a mental disease "not merely of a temporary and transient nature but which might be found to be hereditary," it is error to exclude evidence of insanity in his grandparents).

¹⁸⁰ *State v. Fenik*, *supra*.

¹⁸¹ *State v. Baker* (1912) 246 Mo. 357, 152 S.W. 46; *State v. Warren* (1927) 317 Mo. 843, 297 S.W. 397 (purporting to follow *State v. Baker*, but adding that such evidence is inadmissible "in the absence of proof tending to show that such insanity was inherited from an ancestor which appellant and such collateral relative have in common").

¹⁸² *People v. Marshall* (1930) 209 Cal. 540, 289 Pac. 629; *People v. Garbutt* (1868) 17 Mich. 9 ("If a family of several children should be found, without known cause, to be idiotic, or subject to mental delusion, the inference of hereditary transmission would, in many cases, be entirely conclusive, notwithstanding the inability to point out anything of a similar character in any ancestor"); *Comm. v. Dale* (1919) 264 Pa. 362, 107 Atl. 743 (where both defendant and collateral kinsmen not too far removed have a form of insanity which may be transmissible, the fact may be shown, without proving insanity in the direct line, i.e., parents or grandparents); *Hagan v. State* (1875) 64 Tenn. 615; *State v. Green* (1931) 78 Utah 580, 6 Pac. (2d) 177.

prove that the defendant had suffered such injuries or been afflicted with such diseases.¹⁸³ As in the case of other predisposing circumstances, however, there must be some other evidence tending to prove that the defendant was in fact mentally unsound, before proof of such injuries or diseases will be admitted.¹⁸⁴

(4) Alcohol, drugs, and certain other substances when taken into the body are known to have a temporary or permanent effect upon the mind. There has never been any question but that it is competent to prove, as evidence of mental irresponsibility, that the defendant had been drinking excessively before the crime,¹⁸⁵ or that he was under the influence of liquor or drugs at the time of its commission, or that he was suffering from a deprivation of his accustomed supply of drugs.¹⁸⁶ The fact that the defendant had consumed other substances likely to affect the mind has also been admitted.¹⁸⁷ Here too, however, it seems that the use of such substances likely to cause mental

¹⁸³ *State v. Wright* (1900) 112 Ia. 436, 84 N.W. 541; *Walsh v. People* (1882) 88 N.Y. 458; *Comm. v. Winnemore* (1867) 1 Brewst. (Pa.) 356; *Epps v. State* (1928) 110 Tex. Crim. 406, 10 S.W. (2d) 566. Usually, evidence of such injuries and diseases is admitted without question. *Elias v. Terr.* (1904) 9 Ariz. 1, 76 Pac. 605 (epilepsy); *Beck v. State* (1929) 179 Ark. 1121, 20 S.W. (2d) 177 (venereal disease); *People v. Haensel* (1920) 293 Ill. 33, 127 N.E. 181 (injury to spine); *People v. Krauser* (1925) 315 Ill. 485, 146 N.E. 593 (blow on head). The older cases required that medical testimony be introduced to prove that such diseases as epilepsy may produce mental unsoundness. *Walsh v. People, supra*. But modern courts take judicial notice of the possible effect of epilepsy on the general mental condition. *State v. Wright, supra*.

¹⁸⁴ *People v. Davis* (1894) 4 Cal. Unrep. 524, 36 Pac. 96.

¹⁸⁵ *Terr. v. Davis* (1886) 2 Ariz. 59, 10 Pac. 359; *Martin v. State* (1911) 100 Ark. 189, 139 S.W. 1122; *People v. Blake* (1884) 65 Cal. 275, 4 Pac. 1. The cases in which evidence of protracted drinking bouts, long continued habits of intemperance, and attacks of delirium tremens have been admitted without question, to corroborate the defense of insanity, are too numerous to mention.

¹⁸⁶ *Rogers v. State* (1870) 33 Ind. 543.

¹⁸⁷ *Perkins v. U.S.* (1915) 228 Fed. 408 (chloral); *People v. Krauser* (1925) 315 Ill. 485, 146 N.E. 593 (Bromo Seltzer).

disturbance or deterioration will not be permitted to be proved unless there is some evidence that the defendant was in fact mentally unsound at the time of the crime.¹⁸⁸

3. *Prior and Subsequent Insanity.* Since mental disorder is not a thing of a moment, but usually requires more or less time to develop, it is competent, in order to prove the defendant's responsibility or irresponsibility at the time of the crime, to introduce evidence of his mental condition before and after that time.¹⁸⁹ The prior or subsequent mental condition must not be too remote from the time of the crime, but no general rule can be laid down to determine how remote the evidence may be.¹⁹⁰ Much depends upon the character of the particular evidence offered, and the nature of the unsoundness alleged. Where the evidence indicates a disorder requiring a long period to develop, evidence of mental condition for many years prior may be relevant, though it would not be in a case involving a disorder known to be temporary or of rapid development. The admissibility of prior or subsequent mental condition is therefore in each instance a matter resting largely in the discretion of the trial court.¹⁹¹

The defendant's condition at the time of the trial, it is held, may be considered by the jury as shedding light upon his con-

¹⁸⁸ *Bishop v. Comm.* (1901) 109 Ky. 558, 60 S.W. 190.

¹⁸⁹ *McLean v. State* (1849) 16 Ala. 672; *McAllister v. State* (1850) 17 Ala. 434; *Gardner v. State* (1891) 96 Ala. 12, 11 So. 402; *McCully v. State* (1920) 141 Ark. 450, 217 S.W. 453; *People v. McCarthy* (1896) 115 Cal. 255, 46 Pac. 1073; *Allams v. State* (1905) 123 Ga. 500, 51 S.E. 506; *Peek v. State* (1922) 155 Ga. 49, 116 S.E. 629; *Moore v. Comm.* (1892) 92 Ky. 630, 18 S.W. 833; *Smedley v. Comm.* (1910) 138 Ky. 1, 127 S.W. 485, 129 S.W. 547; *Bond v. State* (1914) 129 Tenn. 75, 165 S.W. 229; *Webb v. State* (1879) 5 Tex. App. 596; *Warren v. State* (1880) 9 Tex. App. 619. *Contra:* *State v. Higgins* (1926) 33 Del. 388, 138 Atl. 597.

¹⁹⁰ *McGonigal v. State* (1923) 74 Colo. 270, 220 Pac. 1003; see cases cited by Wigmore, *op. cit.*, vol. i, pp. 488-490.

¹⁹¹ *McGonigal v. State, supra*; *State v. Crowe* (1909) 39 Mont. 174, 102 Pac. 579.

dition at the time of the crime,¹⁹² and this even where the defense relied upon is temporary insanity.¹⁹³

A civil adjudication of insanity, finding the person either incapable of managing his property, or a fit subject for confinement in an asylum, or both, is admissible to show his mental condition at the time of such adjudication, and, if such adjudication was rendered at a time not too remote from the time of the crime, as tending to show his mental condition at the time of the crime.¹⁹⁴ However, it is usually said that such adjudication is not conclusive of his irresponsibility at the time of the act, because the fact that a person was found incapable of managing his property, or too insane to be allowed his liberty, does not determine that he was insane to such a degree as to come within the legal test of irresponsibility for crime.¹⁹⁵ A few courts draw a distinction between an inquisition of lunacy, determining the person's capacity to manage his property, and an adjudication determining his need of confinement in an asylum or hospital for the insane; while the former is admissible in evi-

¹⁹² *People v. Kirby* (1911) 15 Cal. App. 264, 114 Pac. 794; *People v. Hoch* (1896) 150 N.Y. 291, 44 N.E. 976.

¹⁹³ *Woodall v. State* (1921) 150 Ark. 394, 234 S.W. 266.

¹⁹⁴ *McCully v. State* (1920) 141 Ark. 450, 217 S.W. 453; *People v. Prosser* (1922) 56 Cal. App. 454, 205 Pac. 869 (certificate of discharge from hospital as "not insane" admissible); *Southers v. Comm.* (1925) 209 Ky. 70, 272 S.W. 26 (adjudication of insanity is not conclusive, though defendant was never discharged as cured); *Smedley v. Comm.* (1910) 138 Ky. 1, 127 S.W. 485, 129 S.W. 547; *Wheeler v. State* (1878) 34 Ohio 394; *Bond v. State* (1914) 129 Tenn. 75, 165 S.W. 229; *Taylor v. State* (1905) 49 Tex. Crim. 7, 90 S.W. 647; *Apolinar v. State* (1922) 92 Tex. Crim. 583, 244 S.W. 813; *Kellum v. State* (1922) 91 Tex. Crim. 272, 238 S.W. 940 (adjudication of county court finding defendant sane, two months before, admissible).

¹⁹⁵ *People v. Willard* (1907) 150 Cal. 543, 89 Pac. 124 (fact that defendant had been three times found insane, the last time only a few minutes before he committed the homicide charged, held insufficient to establish irresponsibility); *Southers v. Comm.* (1925) 209 Ky. 70, 272 S.W. 26 (adjudication of insanity not conclusive, although defendant was

dence, the latter, these states hold, is not.¹⁹⁶ There seems no sound reason for this distinction.¹⁹⁷

Practically every state has statutory provision for a judicial determination of the mental condition of persons indicted for crime who, before or during trial, appear to be mentally incapable of making a rational defense.¹⁹⁸ When such a preliminary inquiry is held, and the defendant is found to be at that time sane enough to stand trial, or the contrary, the question may arise, whether such finding is admissible in evidence on a later trial for the crime, as tending to prove his mental condition at the time of the act. There seems no reason why such a finding should not be as admissible in evidence as any other

never discharged as cured or restored); *Witty v. State* (1913) 69 Tex. Crim. 125, 153 S.W. 1146 (adjudication that defendant was insane, and had been so for ten months, during which time the crime charged had been committed, held not conclusive of his insanity at the time of the crime); *Apolinar v. State* (1922) 92 Tex. Crim. 583, 244 S.W. 813 (fact that defendant had been three times adjudged insane held not conclusive).

¹⁹⁶ This rule seems to have originated in the case of *Leggate v. Clark* (1873) 111 Mass. 308. This case has been followed in other states:

Delaware: Rev. Code (1915), §2603, provides: "The commitment of any person to said hospital shall not raise any presumption against the sanity of the person." *Florida*: Adjudication of insanity not admissible in evidence, because the statute providing for the commitment procedure states that it "shall not apply to persons charged with criminal offenses who plead insanity." *Davis v. State* (1902) 44 Fla. 32, 32 So. 822; *Reyes v. State* (1905) 49 Fla. 17, 38 So. 257; *Johnson v. State* (1909) 57 Fla. 18, 49 So. 40. It would seem, however, that the fact that the procedure is not available to persons charged with crime should not be held to mean that evidence of such adjudication is not admissible on a criminal trial. *Indiana*: *Naanes v. State* (1895) 143 Ind. 299, 304, 42 N.E. 609 (proceedings by commission, and finding of sanity, returned shortly before the criminal trial, held inadmissible). *Oklahoma*: The board of insanity, created to determine who should be confined in the asylum, are not courts, and cannot fix legal status, and its findings are not admissible in evidence. *In re Maas* (1900) 10 Okla. 302, 61 Pac. 1057; *Maas v. Terr.* (1901) 10 Okla. 714, 63 Pac. 960.

¹⁹⁷ *Wigmore, op. cit.*, vol. iii, p. 515.

¹⁹⁸ See *post*, chap. vii.

judicial determination of sanity or insanity, but a few courts have excluded evidence of such findings.¹⁹⁹

Evidence not Admissible: Reputation, Medical Books. Hearsay evidence is inadmissible on the question of mental condition, as on any other issue. For that reason, insanity cannot be proved by reputation.²⁰⁰ For the same reason, some states have

¹⁹⁹ *Admitted:* *Turley v. People* (1923) 73 Colo. 518, 216 Pac. 536 (where defendant's experts had testified that he was suffering from a progressive form of insanity and getting worse, state may introduce record of insanity proceedings held a few days before the trial, finding him sane); *Sherrill v. People* (1924) 75 Colo. 401, 225 Pac. 840 (same as *Turley v. People*); *State v. Grendahl* (1906) 131 Ia. 602, 109 N.W. 121 (finding that defendant was too insane to stand trial is admissible on criminal trial held after his recovery, but is not conclusive that he was insane at the time of the crime charged); *Bond v. State* (1914) 129 Tenn. 75, 165 S.W. 229 (verdict that defendant is insane and incapable of defending the charge against him, returned two years after the crime and three years before the trial, is admissible in evidence); *Ray v. State* (1928) 110 Tex. Crim. 31, 7 S.W. (2d) 93.

Excluded: *People v. Ward* (1894) 105 Cal. 335, 38 Pac. 945 (record of proceedings to determine whether defendant was in mental condition to be tried "was evidence of defendant's mental condition at the date when it was made, but not at the date of the killing, and hence was not admissible"); *People v. Gavrilovich* (1914) 265 Ill. 11, 106 N.E. 521 (jury's finding on preliminary inquiry, that accused was insane at that time, and had become so since the crime, not admissible on a later trial for the crime, after recovery, since the purpose of that finding was only to determine his then present condition); *People v. Bechtel* (1921) 297 Ill. 312, 130 N.E. 728 (verdict of jury on preliminary hearing as to his capacity to stand trial is not competent as evidence against him on the trial on the indictment. "The defense of insanity at the time of the commission of a crime may therefore be urged on the hearing of the cause unaffected by the finding of the jury that the defendant was not insane at the time such jury was empaneled"); *People v. Shroyer* (1929) 336 Ill. 324, 168 N.E. 336 (adjudication of insanity after the act charged but before the trial thereon held inadmissible in evidence, because "proof of insanity at one time carries no presumption that it existed prior thereto"). Granted that the only question adjudicated on the insanity hearing is the defendant's condition at that time, why should not the finding on such hearing be admissible to throw light on his condition at the time of the crime?

²⁰⁰ *People v. Pico* (1882) 62 Cal. 50; *State v. Hoyt* (1880) 47 Conn.

held that medical books may not be read to the jury, since the statements so read would lack the sanction of an oath, and would be made by persons not present in court and not liable to cross-examination.²⁰¹ In a few states, however, the reading of excerpts from standard medical works to the jury is permitted.²⁰²

518, 539; *Snell v. U.S.* (1900) 16 App. D.C. 501, 511; *Choice v. State* (1860) 31 Ga. 424; *Brinkley v. State* (1877) 58 Ga. 296; *Walker v. State* (1885) 102 Ind. 502, 1 N.E. 856; *Wright v. Comm.* (1903) 72 S.W. (Ky.) 340; *State v. Charles* (1909) 124 La. 744, 50 So. 699; *State v. Penna* (1907) 35 Mont. 535, 90 Pac. 787; *State v. Lagoni* (1904) 30 Mont. 472, 76 Pac. 1044; *Reed v. State* (1906) 75 Neb. 509, 106 N.W. 649; *State v. Coley* (1894) 114 N.C. 879, 19 S.E. 705; *Womble v. State* (1898) 39 Tex. Crim. 24, 44 S.W. 827; *Cannon v. State* (1900) 41 Tex. Crim. 467, 483, 56 S.W. 351; *Wilson v. State* (1910) 58 Tex. Crim. 596, 127 S.W. 548.

The fact that the defendant bore a nickname of "Crazy Jake" has been held inadmissible, since it may have originated from causes wholly different from unsoundness of mind. *Rinkard v. State* (1901) 157 Ind. 534, 62 N.E. 14. But in most states, evidence that the defendant was known as "crazy Jake," "looney Bill," etc., is admitted without question. *Shaffer v. U.S.* (1904) 24 App. D.C. 417; *Schuessler v. State* (1885) 19 Tex. App. 472.

²⁰¹ *Quattlebaum v. State* (1904) 119 Ga. 433, 46 S.E. 677; *State v. O'Brien* (1862) 7 R.I. 336; *Burt v. State* (1897) 38 Tex. Crim. 397, 40 S.W. 1000, 43 S.W. 344; *Montgomery v. State* (1912) 68 Tex. Crim. 78, 151 S.W. 813; *Rogers v. State* (1905) 77 Vt. 454, 61 Atl. 489. But such books are admissible to contradict or impair the credibility of an expert who bases his opinion upon the particular authority. *Miller v. Comm.* (1930) 236 Ky. 448, 33 S.W. (2d) 590.

²⁰² *Bales v. State* (1879) 63 Ala. 30; *Russell v. State* (1918) 201 Ala. 572, 78 So. 916; *Anderson v. State* (1922) 209 Ala. 36, 95 So. 171; *State v. Hoyt* (1878) 46 Conn. 330 (3 to 2 decision); *State v. Joseph* (1921) 96 Conn. 637, 115 Atl. 85 (but the books must be either accepted standard texts, or books accepted by a medical witness on the stand as authority, helping to form his opinion); *State v. West* (1873) Houston Crim. Cas. (Del.) 371 (but such excerpts do not have the force of law, unless adopted by the opinion of the court).

Dean Wigmore considers the use of learned treatises an exception to the hearsay rule which "deserves a fuller acceptance." *Op. cit.*, vol. iii, §§1690-1700.

CHAPTER VI

PLEADING AND PROCEDURE

§1. WHEN THE DEFENSE OF MENTAL IRRESPONSIBILITY MAY BE RAISED

THE defense that the accused was so mentally disordered at the time of the commission of the alleged offense as not to be criminally responsible is usually thought of as an issue to be raised upon the trial and presented to the jury along with all the other issues determining guilt or innocence. In the great majority of cases, the question is raised and determined at such time, but it may also be raised before that time and after. There are at least four stages in the criminal proceedings when the issue of mental irresponsibility may be raised:

1. At the time of the preliminary hearing.
2. At the time of the grand jury hearing.
3. Upon arraignment.
4. After conviction.

As said above, the question is usually raised at the third stage enumerated. We shall therefore devote most of this chapter to a discussion of the problems arising at this stage, but we shall first give brief consideration to each of the others.

1. *At the Time of the Preliminary Hearing.* The preliminary examination is the first stage in the criminal proceeding at which the defendant may set up his mental irresponsibility at the time of the act charged, as a defense to the charge. However, the issue is rarely raised at this time. Usually, the defendant waives full examination, and withholds his defense until the trial proper. When the offense is one which the examining magistrate himself has jurisdiction to try, he will, of course, have to determine the question of insanity to decide the case. The magistrate has such jurisdiction, however, only in charges involving minor crimes.

Only one state, Mississippi, has a statute governing the practice where "insanity" (irresponsibility) is urged upon the preliminary examination.¹ Even in the absence of statute, however, a discreet magistrate will not grant an unconditional discharge to a defendant whom he finds to be mentally irresponsible, but will arrange to have the necessary steps taken to have such person committed to the proper mental institution.

2. *At the Time of the Grand Jury Hearing.* In eleven states, it is provided by statute that if the grand jury fails to return an indictment against a person charged with crime on the ground of "insanity," the fact shall be certified to the court, which may (and in some states, must) initiate proceedings to have the person committed to an institution.² Most of these statutes are not clear as to whether the "insanity" for which the grand jury may fail to indict means irresponsibility at the time of the act charged, or mental disorder existing at the time of the proceedings before the grand jury. It would seem that they cover both possibilities, except the West Virginia act, which specifically applies only to the case where a person charged with crime is not indicted "by reason of his insanity *at the time of committing the act.*"

These statutes will be more fully considered in a later chapter,³ in connection with the situation where the defendant sets up present mental disorder, at the time of the proceedings, as a reason why he should not at that time be subjected to criminal process.

¹ The Mississippi provision is that if a prisoner brought before a conservator of the peace, charged with crime, appears to have been insane at the time of the offense, and still to be insane, he shall not be discharged, but the chancery court shall be notified, which shall proceed as in other lunacy cases. Miss. Code (1930), §1325.

² Alabama, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Utah, Vermont, and West Virginia. See Digest, p. 294 *et seq.*

³ See p. 342 *et seq.*

In the thirty-seven or more jurisdictions which have no statute on the subject, if the grand jury fails to indict a person on the ground of mental irresponsibility at the time of the act charged, it seems he must be allowed to go at liberty, unless proceedings are started to have him committed as a non-criminal insane person by an inquisition of lunacy, etc. It has been held, however, that a grand jury should not refuse to indict a person whom it believes to be insane, and should not receive evidence on that question.⁴

Where proceedings may be initiated upon information, the prosecuting attorney, like the grand jury, may refuse to start proceedings against a person he believes to be insane and irresponsible. There are no statutes governing the procedure where the prosecutor refuses to act for such reason, except in Utah.⁵ As a rule, however, the prosecuting attorney will probably prefer to bring the person to trial, and have the question of responsibility or mental unsoundness determined there.

3. *Upon Arraignment.* Questions of insanity, either as a defense (that the accused was so mentally disordered at the time of the act charged as to be irresponsible) or as a bar to trial (that the accused is presently too disordered to be put upon trial), are usually raised for the first time upon arraignment, when the defendant is required to plead to the indictment or information. The problem of present insanity at the time of the criminal proceedings will be dealt with in the next chapter.⁶ The procedure for pleading mental irresponsibility at the time of the act will be discussed at length in section 2.

4. *After Conviction: Mental Irresponsibility as Ground for New Trial.* After conviction and during the term at which the conviction was had, the trial court may grant a new trial, where it is shown that on another trial the defendant can produce evidence which would probably change the verdict; that such evi-

⁴ U.S. v. Lawrence (1835) 4 Cranch C.C. 514, 26 Fed Cas. No. 15,576.

⁵ See p. 325.

⁶ See p. 346 *et seq.*

dence is newly discovered since the trial; that it is not merely cumulative; and that the failure to produce it on the first trial was not owing to any want of diligence. This general rule applies where a new trial is requested on the ground of newly discovered evidence that the defendant was mentally irresponsible at the time of the act charged.⁷ The motion must be supported by affidavits, or by satisfactory reasons for their absence.⁸

The rule that the evidence relied upon for a new trial must not be merely cumulative, it has been said, should not be as strictly applied in criminal cases involving cumulative evidence of insanity as in civil cases. Evidence of transactions and circumstances not before testified to, tending to prove that the defendant was insane at the time of the offense, has accordingly been held to be not merely cumulative.⁹ So, too, it has been held by the Texas Court of Criminal Appeals that the rule requiring the defendant to show that the failure to produce the evidence earlier was not owing to a want of diligence is not so rigidly enforced where the defense is insanity, as in other cases; if the defendant was in fact insane, he cannot be expected to exercise diligence in producing proof of that fact.¹⁰ It would seem that

⁷ *People v. Oxnam* (1915) 170 Cal. 211, 149 Pac. 165; *James v. State* (1920) 150 Ga. 76, 102 S.E. 425; *Lilly v. People* (1884) 148 Ill. 467, 36 N.E. 95; *People v. Johnson* (1921) 298 Ill. 52, 131 N.E. 149; *People v. Cassidy* (1920) 113 Misc. Rep. 676, 186 N.Y. Supp. 289. The courts are inclined to be strict in enforcing these requirements, and to disfavor granting new trials for newly discovered evidence only. See, for example, the facts in *People v. Oxnam, supra*.

⁸ *People v. Lawson* (1918) 178 Cal. 722, 174 Pac. 885; *Runnels v. State* (1925) 101 Tex. Crim. 434, 276 S.W. 289.

⁹ *Andersen v. State* (1876) 43 Conn. 514. The court in this case said that in many cases, insanity "can only be established by a series of facts and circumstances, and acts and conduct of the subject, extending over a considerable period of time. A large number of acts indicating insanity will generally produce a greater effect upon the mind of the trier than a smaller number."

¹⁰ *Schuessler v. State* (1885) 19 Tex. App. 472; *Horhouse v. State* (1899) 50 S.W. 361; *Hill v. State* (1899) 53 S.W. 845; *Walker v. State*

this should not excuse want of diligence on the part of counsel, however, but the Texas cases do not seem to require diligence on the part of either defendant or counsel.¹¹

In Indiana, where the defense of insanity must be raised by a special plea, it is held that if no plea of insanity was made on the trial, the defendant cannot complain of a refusal to grant a new trial on the ground of newly discovered evidence of insanity; for on motion for a new trial, the evidence alleged as newly discovered should relate to the issues made, and not to matters which were not involved in the prosecution.¹²

On Appeal. Where the defense of irresponsibility by reason of insanity was not raised at the trial the reviewing court will not consider the question on appeal or *habeas corpus*.¹³

§2. HOW THE DEFENSE OF MENTAL IRRESPONSIBILITY IS TRIED

At common law, the defense that the accused at the time of the act (if he committed it) was too insane to be criminally responsible was admissible under the plea of not guilty, and this is the law today in forty American states.¹⁴ No special plea of

(1919) 86 Tex. Crim. 441, 216 S.W. 1085; *Toussaint v. State* (1922) 92 Tex. Crim. 374, 244 S.W. 514; *Lindsey v. State* (1924) 97 Tex. Crim. 300, 260 S.W. 862; *Runnells v. State* (1925) 101 Tex. Crim. 434, 276 S.W. 289.

¹¹ *Horhouse v. State*, *supra* ("the question of diligence is not to be considered by the court"); *Walker v. State*, *supra* ("a new trial should be granted for proof of facts which show insanity, although no diligence was used to obtain such evidence before the trial").

¹² *Donahue v. State* (1905) 165 Ind. 148, 74 Ind. 996; *Hopkins v. State* (1913) 180 Ind. 293, 102 N.E. 851. See Digest, p. 301.

¹³ *State v. St. Clair* (1898) 6 Ida. 109, 53 Pac. 1; *Ex parte McKenzie* (1930) 116 Tex. Crim. 144, 28 S.W. (2d) 133.

¹⁴ Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wyoming. See Digest, p. 294 *et seq.*

"not guilty by reason of insanity" is required, and it has even been held in some of these states that such a special plea is not permitted.¹⁵

Special Plea. In five of the forty states, the defendant is permitted by statute to plead that he is not guilty by reason of insanity,¹⁶ but that defense need not be specially pleaded, it seems, unless the defendant wishes.¹⁷ In eight states, the defense can only be raised by a special plea.¹⁸ Unless such special plea is made, the defense of insanity cannot be introduced at the trial. No detailed statement is required by most of these states; the simple plea that the defendant is "not guilty by reason of insanity" is sufficient. The Washington statute requires more detailed allegations; the plea must set forth not only that the defendant was insane or mentally irresponsible at the time of the crime charged, but also either that the condition still exists, or that the defendant has since become sane.

The Indiana and Washington statutes require the plea of insanity to be made in writing, while the statutes of California and Colorado state that the plea shall be made orally. The Alabama, Louisiana, Ohio, and Wisconsin acts are silent on the matter; it would seem that in these states the plea of insanity is made like any other plea, i.e., orally.

Four of the eight states requiring a special plea of insanity expressly provide that this plea must be made "at the time of arraignment." In three of these, however, Ohio, Washington, and Wisconsin, the court, in its discretion, may permit the plea

¹⁵ *Johnson v. State* (1909) 57 Fla. 18, 49 So. 40; *Alford v. State* (1911) 137 Ga. 458, 73 S.E. 375; *State v. Potts* (1888) 100 N.C. 457, 6 S.E. 657; *State v. Branton* (1899) 33 Ore. 533, 550, 56 Pac. 267.

¹⁶ Maine, Maryland, Nebraska, New Hampshire, and New York. See Digest, p. 294 *et seq.*

¹⁷ *Ostrander v. People* (1882) 28 Hun 38; *People v. McElvaine* (1891) 125 N.Y. 596, 26 N.E. 929; *People v. Joyce* (1922) 233 N.Y. 61, 134 N.E. 836.

¹⁸ Alabama, California, Colorado, Indiana, Louisiana, Ohio, Washington, and Wisconsin. See Digest, p. 294 *et seq.*

to be entered at a later time,¹⁹ and in the fourth, Alabama, the same result has been reached by judicial decision.²⁰ In Indiana, also, while the statute does not provide when the plea must be entered, it has been held that it may be made after the time for arraignment.²¹ The Louisiana Code of Criminal Procedure does not expressly state when the plea of insanity must be made, but does provide that a plea of not guilty may be withdrawn at any time "with the consent of the court," and some other plea set up.²²

In Michigan, while no special plea of insanity is required, the defense must notify the prosecution in writing whenever it is intended to offer evidence of insanity, either at the time of the act charged, or at the time of trial. This notice must be given at the time of arraignment or within ten days thereafter and not less than four days before trial. If such notice is not given, the court in its discretion may exclude evidence of insanity.²³

Separate Trial of Insanity Defense. The issue of insanity is tried separately from the other issues in the trial in California,²⁴ Louisiana,²⁵ and Maryland.²⁶ In Colorado, it may be tried separately or with the main case, in the discretion of the court.²⁷ Under such a statute, evidence of the defendant's insanity is not admissible on the trial on the plea of not guilty, but can only be introduced on the separate trial of that issue.²⁸

¹⁹ See pp. 319, 328, and 330.

²⁰ *Walker v. State* (1890) 91 Ala. 76, 9 So. 87; *Morrell v. State* (1902) 136 Ala. 44, 34 So. 208; *Gordon v. State* (1906) 147 Ala. 42, 41 So. 847; *Rohn v. State* (1914) 186 Ala. 5, 65 So. 42; *Knott v. State* (1918) 202 Ala. 360, 80 So. 442; *Baker v. State* (1923) 209 Ala. 142, 95 So. 467.

²¹ *Barber v. State* (1925) 197 Ind. 88, 149 N.E. 896.

²² La. Code of Crim. Proc. (1928), art. 265; see also *State v. Harville* (1930) 170 La. 991, 129 So. 612.

²³ Mich. Comp. Laws (1929), §§17313, 17314.

²⁴ See p. 296.

²⁵ See p. 305.

²⁶ See p. 306.

²⁷ See p. 297.

²⁸ *People v. Lazarus* (1929) 207 Cal. 507, 279 Pac. 145; *State v. Harville* (1930) 170 La. 991, 129 So. 612.

The California act is unique in that it requires the defense of insanity to be tried separately, to a jury, *after* the trial on the other issues, if any. In the other states providing for a separate trial, the insanity issue is tried first.

Under the Louisiana procedure, a defendant interposing a plea of insanity is first examined by a commission, made up of the coroner of the parish and the superintendents of the two state insane hospitals. If this commission finds him insane, either presently or at the time of the act, he is committed to the criminal ward of a hospital without further ado. A finding that the defendant was insane at the time of the act charged precludes the state from ever bringing him to trial on the indictment.²⁹ Even if the commission finds him presently sane, though insane at the time of the act, it is held proper to commit him to an asylum, where by lapse of time and by observation, it can be determined whether he may with reasonable safety be returned to society.³⁰ If the commission reports him sane, the defendant is given a judicial hearing on the issue, before the judge without a jury, or before a jury of five or twelve, according as the charge on the indictment is triable.³¹ If found insane, he is forthwith committed to the criminal ward of an insane hospital. If found sane, he is tried upon the plea of not guilty. This procedure has been held constitutional.³²

A radical revision of this procedure was attempted soon after its enactment, by a law which made the decision of the commission conclusive in all cases, and permitted no judicial hearing on the issue of insanity whatever, either with or without a jury, but this was declared unconstitutional.³³

²⁹ *State v. Burris* (1929) 169 La. 520, 125 So. 580.

³⁰ *State v. Toon* (1931) 172 La. 631, 135 So. 7.

³¹ The Louisiana Code of Criminal Procedure (arts. 337-342) provides for trial by a jury of twelve in capital cases, by a jury of five in felony cases, and by a judge without a jury in misdemeanor cases.

³² *State v. Burris* (1929) 169 La. 520, 125 So. 580; *State v. Toon* (1931) 172 La. 631, 135 So. 7; *State v. Harper* (1931) 172 La. 1067, 136 So. 54.

³³ *State v. Lange* (1929) 168 La. 958, 123 So. 639.

Constitutionality of Special Statutory Procedure. The requirement that mental irresponsibility must be set up by special plea has been held constitutional.³⁴ The further provision that the issue on this special plea is to be determined by a separate proceeding has also been upheld, both where the statute required the trial on the question of insanity to be held before the main trial,³⁵ and where it is held afterward.³⁶ Such provisions do not deny the defendant a jury trial on any of the issues he may raise, it is held, but merely provide that the issues shall be tried by the jury separately, and in a certain order.³⁷

However, it seems a more debatable question whether the right to trial by jury is not violated in the provision for a separate trial of the issue of insanity, before the same *or a different* jury than that trying the main case. Both of these proceedings together constitute one trial.³⁸ The right to trial by jury guaranteed in our state and federal constitutions contemplates a jury of twelve, no more and no less.³⁹ Yet if the court impanels a different jury to try the issue of sanity from that which tries the other issues, the whole case is finally decided by twenty-four jurors.

It is true that at common law, special pleas could be tried by a different jury, but the matters which were required to be pleaded specially at common law (former acquittal, conviction or jeopardy, pardon, etc.) did not involve the merits, while the plea of insanity puts in issue one of the essential elements of

³⁴ *Rohn v. State* (1914) 186 Ala. 5, 65 So. 42.

³⁵ *State v. Toon* (1931) 172 La. 631, 135 So. 7; *Bennett v. State* (1883) 57 Wis. 69, 14 N.W. 912.

³⁶ *People v. Hickman* (1928) 204 Cal. 470, 268 Pac. 909, 270 Pac. 1117.

³⁷ *People v. Hickman* (1928) 204 Cal. 470, 268 Pac. 909; *People v. Leong Fook* (1928) 206 Cal. 64, 273 Pac. 779; *State v. Toon* (1931) 172 La. 631, 135 So. 7.

³⁸ *People v. Leong Fook* (1928) 206 Cal. 64, 273 Pac. 779; *People v. Marshall* (1930) 209 Cal. 540, 289 Pac. 629; *Bennett v. State* (1883) 57 Wis. 69; *Schissler v. State* (1904) 122 Wis. 365, 99 N.W. 593.

³⁹ *Patton v. U.S.* (1929) 281 U.S. 276, 50 Sup. Ct. 253, 74 L. Ed. 854; *People v. O'Neil* (1874) 48 Cal. 257; *People v. Peete* (1921) 54 Cal. App. 333, 202 Pac. 51.

guilt—the defendant's mental capacity. The California court has held, however, that this issue is not essential to the question of guilt or innocence; that the verdict of "guilty" on the first proceeding means literally what it says and that "the plea of insanity is, and of necessity must be, a plea of confession and avoidance."⁴⁰ In Louisiana, also, it has been held that the provision permitting two different juries to try the two issues is not unconstitutional.⁴¹

§3. FORM OF THE VERDICT

In order that proceedings for commitment to an institution may be brought against a defendant acquitted by reason of insanity, it is necessary that it appear that he was acquitted on that ground. A defendant pleading insanity is not precluded from setting up other defenses as well, and a general verdict of not guilty might not reveal whether the jury found the defendant mentally irresponsible at the time of the act, or whether it acquitted him on some other ground. The great majority of jurisdictions therefore now provide that where the jury acquits on the ground of insanity, that fact should appear in the verdict.⁴²

⁴⁰ *People v. Troche* (1928) 206 Cal. 35, 273 Pac. 767; *People v. Leong Fook* (1928) 206 Cal. 64, 273 Pac. 779 (Preston, J., dissenting). On appeal, the court has authority to reverse judgment, with direction to complete the trial on the issue of "not guilty by reason of insanity," without ordering a new trial on the other issue of "not guilty." *People v. Marshall* (1930) 209 Cal. 540, 289 Pac. 629 (Preston, J., dissenting). See Shepherd, "The Plea of Insanity Under the 1927 Amendments to the California Penal Code" (1929), 3 *So. Cal. L. Rev.* 1.

⁴¹ *State v. Toon* (1931) 172 La. 631, 135 So. 7; *State v. Harper* (1931) 172 La. 1067, 136 So. 54.

⁴² Alabama, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin. See Digest, p. 294 *et seq.*

Historical Development. Until the beginning of the nineteenth century, a defendant found to have been mentally irresponsible at the time of the act was entitled at common law to an unconditional acquittal. In 1800, the English Criminal Lunatics Act was adopted,⁴³ providing that when the jury acquit a person pleading insanity, they were to find specially whether he was insane at the time of the commission of the act, and whether he was acquitted on that ground. If the jury did so find, such person was forthwith to be committed "until His Majesty's pleasure shall be known." Similar legislation was enacted by most of the American states soon afterward, although in some states not until a century later.⁴⁴

In England, the Criminal Lunatics Act of 1800 has been superseded by the Trial of Lunatics Act of 1883,⁴⁵ which provides that if the jury find that the defendant committed the act charged but was insane and irresponsible at the time, the verdict shall be "guilty but insane." This form of verdict, in legal theory, is an anomaly, for, as has been expressly held, it is in effect a verdict of acquittal, from which no appeal can be taken.⁴⁶ Nevertheless, it provides a technical ground for detaining the defendant in an institution, without allowing him to obtain his release upon *habeas corpus*, as he might if held under a non-criminal commitment.

It is interesting to note that it has at times been urged that the English verdict of "guilty but insane" be adopted in this country, in order to prevent the abuse of the writ of *habeas corpus*,⁴⁷

⁴³ 40 Geo. III, chap. 94.

⁴⁴ In Nebraska, for example, such a provision was enacted only in 1909. Neb. Laws 1909, chap. 74, p. 333. Before that time, it was correct to instruct the jury that if the defendant was legally insane, they must acquit and "turn him loose." *Ballard v. State* (1886) 19 Neb. 609, 28 N.W. 271.

⁴⁵ 46 & 47 Vict., chap. 38.

⁴⁶ *Appeal of Felstead* (1914) 10 Crim. App. Rep. 129.

⁴⁷ See, for example, the recommendation of the New York State Bar Association, reported in (1911), 2 *Jour. Crim. Law & Crim.* 113. This was attempted in Mississippi; Miss. Code (1930), §1327. But the act was held

while in England it has been recommended that the form of verdict be changed, to that used here.⁴⁸

Form of Verdict Required by American Statutes. In almost all states, it is provided by statute that if the jury acquits a defendant by reason of insanity, "it shall state that fact in its verdict," or "it shall return a verdict of 'not guilty by reason of insanity.'"⁴⁹ In a few jurisdictions, no such express provisions exist,⁵⁰ but in most of these, the jury is in practice always instructed to the same effect. In Wyoming, however, no special verdict is used, and a defendant whom the jury finds mentally irresponsible is simply acquitted by a general verdict of not guilty.⁵¹

In the District of Columbia,⁵² Missouri,⁵³ and Ohio,⁵⁴ the jury must state whether they acquit the defendant on the "*sole ground*" that he was insane and irresponsible at the time of the act. In Minnesota,⁵⁵ they must state whether they found the defendant to have been "insane, an idiot or an imbecile" at the

unconstitutional. *Sinclair v. State* (1931) 161 Miss. 142, 132 So. 581. See *post*, p. 430.

⁴⁸ In 1923, the Committee on Insanity and Crime, in its report (p. 12), recommended that the form of verdict be changed from "guilty but insane" to the following: "That the accused did the act (or made the omission) charged, but is not guilty on the ground that he was insane so as not to be responsible according to law at the time."

⁴⁹ See *ante*, note 42.

⁵⁰ Connecticut, Georgia, Michigan, New Jersey, North Carolina, South Carolina, Tennessee, Wyoming, and the Federal Courts. The statutes of Connecticut, New Jersey, North Carolina, and South Carolina evidently contemplate such a verdict, however, for they provide what shall be done with the defendant when the jury returns a verdict of not guilty by reason of insanity. See *post*, pp. 266, 267.

⁵¹ "Jurors are instructed as to insanity as a defense but no provision is made for a verdict in which they set forth insanity as a reason for their verdict. The general verdict would cover the matter under our practice." Letter to the writer from Mr. William O. Wilson, Attorney General of Wyoming.

⁵² See p. 298.

⁵³ See p. 311.

⁵⁴ See p. 319.

⁵⁵ See p. 310.

time of the offense, and whether they acquitted him on that ground, and further, whether in their opinion the defendant had "homicidal tendencies" at the time of the offense.

In Michigan, it has been held that a jury cannot be compelled to return a special verdict.⁵⁶

In Illinois,⁵⁷ Mississippi,⁵⁸ Missouri,⁵⁹ and Washington,⁶⁰ the statutes require the jury to state not only whether the defendant was insane and irresponsible at the time of the act, but further, whether he has since recovered, or is still insane.⁶¹ The most detailed statute of the kind is that of the state of Washington, which requires the court to instruct the jury in cases where the defense of insanity has been raised, that if they acquit, they should find specially: "(1) whether the defendant committed the crime and if so, (2) whether they acquit him because of his insanity or mental irresponsibility at the time of its commission, (3) whether the insanity or mental irresponsibility continues and exists at the time of the trial, and (4) whether, if such condition of insanity or mental irresponsibility does not exist at the time of the trial, there is such likelihood of a relapse or recurrence of the insane mental irresponsible condition, that the defendant is not a safe person to be at large."

In Mississippi, the jury must state not only whether they acquit the defendant on the ground of insanity (irresponsibility), and whether he has since been restored to reason, but also, more specifically, "whether he be dangerous to the community."

This form of statute, requiring the jury to find not only as to the defendant's responsibility or irresponsibility at the time of the act charged, but also his present condition at the time they

⁵⁶ *Underwood v. People* (1875) 32 Mich. 1.

⁵⁷ See p. 300.

⁵⁸ See p. 311.

⁵⁹ See pp. 311, 312.

⁶⁰ See p. 328.

⁶¹ In Maryland, it has been held that this form of statute specifically requires a finding on the question of insanity, both at time of the crime and of the verdict, and in the absence of such finding, the verdict is fatally defective. *Price v. State* (1930) 159 Md. 491, 151 Atl. 409 (4-3 decision).

render their verdict, has been criticized by the Michigan court, which has pointed out that "as no insane person is subject to be put on trial, a finding that they had been trying such a person would be somewhat inconsistent with the notion that the trial could have been proper."⁶²

Form of Verdict Where Issue of Irresponsibility is Tried Separately. In certain states, as we have seen,⁶³ the issue of mental irresponsibility is tried separately, either before or after the other issues in the case. In such a trial of the insanity issue, the verdict, of course, is not "not guilty by reason of insanity," but simply "sane" or "not sane," for the whole question of guilt or innocence is not finally determined by such verdict.

§4. DISPOSAL OF DEFENDANTS FOUND MENTALLY IRRESPONSIBLE

Analysis of Procedure in Various States. When a defendant is acquitted on the ground of mental irresponsibility, statutes in almost all states provide for certain steps to be taken to secure his commitment as an insane person. These statutory provisions vary considerably. Roughly, they may be grouped as follows:

1. Upon such a verdict, the court in eight states is required forthwith to order the defendant committed to the proper mental institution, without any further inquiry as to whether he continues presently to be insane or not.⁶⁴

This compulsory and automatic commitment upon such verdict is also required in England.⁶⁵ Likewise, in the four states where the issue of insanity is tried in a separate proceeding, either before the other issues in the case⁶⁶ or after,⁶⁷ if the jury on

⁶² Underwood v. People (1875) 32 Mich. 1.

⁶³ See p. 259.

⁶⁴ Kansas, Massachusetts (in murder and manslaughter cases), Minnesota, Nebraska, Nevada, Ohio, Oklahoma(?), Wisconsin. See p. 268 and Digest, p. 294 *et seq.*

⁶⁵ Trial of Lunatics Act, 46 & 47 Vict., chap. 38, §2.

⁶⁶ Colorado, Louisiana, Maryland. See pp. 297, 304, and 306.

⁶⁷ California. See p. 296.

this issue find the defendant insane, he is forthwith committed to an institution.

2. In seven states, the court upon such verdict "may" or "shall have power" to order such commitment.⁶⁸

3. In six states, the court may order such commitment if, after an investigation, it is satisfied that the defendant is still insane.⁶⁹

4. In eleven states, the court may order such commitment, if it deems the defendant's discharge to be dangerous to public peace or safety.⁷⁰

5. In two jurisdictions, the court does not itself commit a defendant acquitted by reason of insanity, but certifies the fact to the governor, or to some other official, who may then order such commitment.⁷¹

6. Four western states require a second jury trial to determine whether a defendant acquitted of crime because of mental irresponsibility at the time of the act continued to be insane at the time of the verdict.⁷²

7. In four of the five states where the jury in the criminal trial finds not only as to the defendant's mental responsibility at the time of the act charged, but also as to his present mental condition, if they find that the defendant was insane at the time of the act and continues so, the court is required to order his commitment.⁷³ In the fifth, Missouri, the court on such a ver-

⁶⁸ Arkansas, Connecticut, Delaware, Maine, New Mexico, Pennsylvania, South Carolina. See p. 269 *et seq.*

⁶⁹ Alabama, Indiana, Kentucky, Michigan, New Jersey, North Carolina. See p. 270 *et seq.*

⁷⁰ Florida, Iowa, Massachusetts (in other than murder and manslaughter cases), New Hampshire, New York, North Dakota, Oregon, South Dakota, Vermont, Virginia, West Virginia. See p. 271.

⁷¹ District of Columbia (Secretary of the Interior), Rhode Island (governor). See p. 272.

⁷² Arizona, Idaho, Montana, Utah. See p. 272 *et seq.*

⁷³ Illinois, Maryland, Mississippi, Washington. See p. 274 *et seq.*

dict is given discretion as to whether the defendant should be committed.⁷⁴

Four states and the Federal government have no statutes setting forth the procedure to be followed in such case.⁷⁵

1. *Compulsory Commitment on Acquittal by Reason of Insanity.* In the eight states which require the court forthwith to commit to an insane institution a defendant acquitted of crime by reason of insanity, such a verdict is deemed sufficient to justify a presumption that he continues insane at the time of the trial and verdict. If this presumption is erroneous, that fact will be discovered by the authorities at the institution, or can be determined upon hearing upon return of a writ of *habeas corpus*.

The mandatory provision that, upon a verdict of not guilty by reason of insanity, the court must forthwith order the defendant committed to an insane hospital, has the advantage of eliminating a second proceeding to determine whether the insanity still exists. It also eliminates the possibility of a verdict finding that the defendant was insane and irresponsible at the time of the act, but presently sane, and so entitled to an unconditional discharge.

At the same time, this procedure does not seriously impair the defendant's rights. If he himself alleges and proves that he was mentally irresponsible at the time of the offense, he cannot complain if the law thereupon raises the reasonable presumption that his mental unsoundness continues to exist, and treats him accordingly.⁷⁶ The authorities at the hospital to which he is sent can be relied upon to discover whether he is in fact presently normal, and to report that fact if they so find. Even if the authorities fail in this regard, the defendant has the right in almost every state to raise the question of his present sanity upon

⁷⁴ See p. 274.

⁷⁵ Georgia, Tennessee, Texas, Wyoming. See p. 275 *et seq.*

⁷⁶ *State v. Toon* (1931) 172 La. 631, 135 So. 7.

writ of *habeas corpus*. "The right to apply at any time for discharge has been held to reconcile even the absence of hearing in the first instance with the constitutional requirement of due process, and if upon such proceeding the petitioner is found to be insane his detention may be continued."⁷⁷ Statutes requiring prompt commitment upon acquittal on the ground of insanity have accordingly been held constitutional.⁷⁸ The contrary view has been taken by the Michigan Supreme Court, which has held that the procedure violates due process, in that "the prisoner is sent into confinement without any legal investigation into his condition at that time, when he may be perfectly sane, and when, having been acquitted, he is entitled to all the privileges of any innocent man. There may be a very long interval between the offense and the trial."⁷⁹

2. *Commitment in Discretion of the Court.* Perhaps the most general method of disposing of defendants acquitted on the ground of insanity is to authorize the judge, on such verdict, to order such person committed, or to make inquiry as to whether such commitment is necessary. About half the states have provisions along these general lines, but only the seven mentioned⁸⁰ give the court discretion to order such commitment, without requiring some investigation as to the defendant's present mental condition, or dangerousness.

A statute giving the trial court power "in its discretion" to commit to a hospital persons acquitted of crime by reason of insanity has been held unconstitutional in North Carolina.⁸¹ "The fatal infirmity of the statute," said the North Carolina

⁷⁷ Freund, *Police Power* (1904), §255, p. 245.

⁷⁸ *In re Slayback* (1930) 209 Cal. 480, 288 Pac. 769; *In re Clark* (1912) 86 Kans. 539, 121 Pac. 492; *In re Beebe* (1914) 92 Kans. 1026, 142 Pac. 269; *In re Ostatter* (1918) 103 Kans. 487, 175 Pac. 377; *State v. Toon* (1931) 172 La. 631, 135 So. 7.

⁷⁹ *Underwood v. People* (1875) 32 Mich. 1.

⁸⁰ See note 68.

⁸¹ *In re Boyett* (1904) 136 N.C. 415, 48 S.E. 789.

Supreme Court, "is that the power to commit is vested in the Court to be exercised 'in its discretion.' No provision is made for notifying the person whose liberty is involved, nor is the Court required to make any investigation either by itself, by the examination of witnesses, by calling to its aid medical witnesses, or otherwise."

This reasoning assumes that by "discretion" the statute meant arbitrary discretion. There is no ground for such construction; it is a general rule that the exercise of judicial discretion must be reasonable, and is subject to reversal if abused. The objection that no notice to the person is provided for has been held unsound,⁸² as has also the objection that no investigation is required.⁸³

3. *Commitment by the Court after Investigation.* The statutes of six states are worded so as to conform to the criticisms of the North Carolina case just quoted; the court, on such verdict of acquittal, is required to make an investigation, and if satisfied upon such investigation that the defendant is still insane and in need of confinement, may order him committed.⁸⁴ The most detailed such statute is that of North Carolina,⁸⁵ as amended following the case cited above. Upon an acquittal on the ground of insanity, the court must make an inquisition in regard to his mental condition. Notice must be given the defendant or his attorney, and witnesses must be examined. If the judge finds that the defendant is dangerous to himself or others, and that his confinement is necessary, he shall order him confined.

⁸² *People ex rel. Peabody v. Chanler* (1909) 133 App. Div. 159, 162, 117 N.Y. Supp. 322.

⁸³ *People ex rel. Peabody v. Chanler, supra*; *State ex rel. Thompson v. Snell* (1907) 46 Wash. 327, 333, 89 Pac. 931.

⁸⁴ Alabama, Indiana, Kentucky, Michigan, New Jersey, North Carolina. See Digest, p. 294 *et seq.*

⁸⁵ N.C. Code (1931), §6237.

Similar, though less detailed, provisions exist in the other five states of this group. The Michigan statute⁸⁶ adds that in making its investigation, the court shall call two or more reputable physicians and other credible witnesses, and the prosecuting attorney, to aid in the examination and, if necessary, may call a jury for that purpose.

The Indiana statute⁸⁷ provides that the court may order the defendant confined not only if it finds him then insane, but also if it finds that he is sane but that "the recurrence of an attack of insanity is highly probable."

4. *Commitment if the Court Deems Discharge to be Dangerous.* In this group of eleven states, the court is not expressly required to make any inquiry into the defendant's present mental condition before ordering him confined. It may order such confinement if it deems his discharge or going at large to be dangerous to public peace or safety.⁸⁸ The court's decision on the matter, it seems, may be based upon new evidence, or upon the facts concerning the defendant's mental condition produced at the criminal trial.

⁸⁶ See p. 309.

⁸⁷ See p. 302.

⁸⁸ The wording of the different statutes varies. The court, they provide, shall commit a defendant acquitted on the ground of insanity: "If the defendant be in custody and they deem his discharge dangerous to the public peace or safety" (New York); "if it deem his discharge dangerous to public peace or safety" (Virginia); "if it deems his being at large dangerous to the public peace or safety" (Oregon); "if it is of the opinion that it will be dangerous that such person should go at large" (New Hampshire); "if the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the people" (Florida); "if the discharge or going at large of said insane person is considered dangerous to the community" (Vermont); "if the defendant is in custody, and it deems his discharge dangerous to the public safety" (North and South Dakota); "if the defendant is in custody and his discharge is found to be dangerous to the public peace and safety" (Iowa); "if it deem him dangerous" (West Virginia); "if satisfied that he is insane" (Massachusetts). See Digest, p. 294 *et seq.*

The constitutionality of these statutes, authorizing the court to commit a defendant by reason of insanity "if it deems his discharge to be dangerous," etc., has been affirmed in several cases.⁸⁹

5. *Commitment in Discretion of the Governor or Other Administrative Officer.* In Rhode Island,⁹⁰ the court does not itself commit a defendant whom the jury has acquitted on the ground of insanity, but certifies the fact to the governor, if it deems the going at large of such person to be dangerous to the public peace, and the governor may thereupon make provision for the removal of such person to the proper institution.

In the District of Columbia,⁹¹ the court upon such an acquittal "may certify the fact to the Secretary of the Interior, who may order such person to be confined in the hospital for the insane."

A Mississippi law, providing that persons accused of murder and found "guilty but insane," should be sentenced to life imprisonment, and authorizing the governor to hold an investigation as to whether such person should be confined in the penitentiary or transferred to an insane institution, was held unconstitutional.⁹²

6. *Second Jury Trial to Determine Present Sanity.* The four western states of Arizona,⁹³ Idaho,⁹⁴ Montana,⁹⁵ and Utah⁹⁶ provide that upon a verdict of not guilty by reason of insanity, "the court may order a jury to be summoned," to inquire

⁸⁹ *Interdiction of Gasquet* (1915) 136 La. 957, 68 So. 89; *People ex rel. Peabody v. Baker* (1908) 59 N.Y. Misc. 359, 110 N.Y. Supp. 848; *People ex rel. Peabody v. Chanler* (1909) 133 App. Div. 159, 117 N.Y. Supp. 322, *aff'd*, 196 N.Y. 525, 89 N.E. 1109; *In re Brown* (1905) 39 Wash. 160, 81 Pac. 552; *State ex rel. Thompson v. Snell* (1907) 46 Wash. 327, 89 Pac. 931.

⁹⁰ R.I. Gen. Laws (1923), §1604.

⁹¹ D.C. Code (1929), Title 6, §374.

⁹² *Sinclair v. State* (1931) 161 Miss. 142, 132 So. 581.

⁹³ See p. 295.

⁹⁴ See p. 300.

⁹⁵ See p. 312.

⁹⁶ See p. 325.

whether the defendant continues to be insane. "The court may cause the same witnesses to be summoned who testified on the trial, and other witnesses, and direct the prosecuting attorney to conduct the proceedings, and counsel may appear for the defendant." If the jury find the defendant insane, he shall be committed by the sheriff to the state insane asylum. If it finds him sane, he is discharged.

This requirement of a second jury trial to decide whether a defendant found to have been mentally irresponsible at the time of the act charged, still continues insane at the time of the verdict, seems the most cumbersome of all possible methods of determining the question. It was evidently adopted by these four states from the California Code,⁹⁷ but California abolished this clumsy procedure in 1927, and gave the trial court power forthwith to commit a defendant found to have committed an offense while insane.⁹⁸ A jury trial is necessarily a slow method of finding facts; it justifies itself in certain types of issues, where a decision representative of public opinion is desired. Whether or not a person was in such mental condition at the time of committing an offense as to justify punishing him for it, may perhaps be regarded as a question which should properly be left to a jury. But whether such a person is at the time of the verdict still so mentally disordered as to require institutional care, or whether he may safely be discharged, is essentially a psychiatric question, which can be properly answered only by experts. We have already pointed out that there is no compelling reason why any such inquiry should be made at the time of the verdict. Having been found insane and irresponsible at the time he committed the offense charged, he should be confined for treatment as a criminally insane person without further ado, for he has always the right to demand his release whenever he can show that he has recovered his sanity. But if such an inquiry is

⁹⁷ Cal. Penal Code (1923), §1167.

⁹⁸ Cal. Penal Code (1931), §1026.

made, it should be a scientific, as distinguished from a judicial, investigation. The defendant should not be deemed entitled to a judicial hearing on this question.⁹⁹

7. *Compulsory Commitment Where Jury Determines Mental Condition at Time of Verdict as Well as at Time of Act.* In four of the five states where the jury, in acquitting a defendant by reason of insanity, is required to state not only that it acquits for that reason but also whether the defendant presently continues to be insane or has since recovered,¹⁰⁰ a verdict that he was insane at the time of the act, but has recovered his sanity by the time of the verdict, entitles him to an unconditional discharge, and to go at liberty. If the verdict is that he was insane and irresponsible at the time of the act, and still continues insane (or, in Washington, that though recovered, he is subject to a relapse) he is forthwith committed by the judge to an institution for the insane. In either case, the jury's verdict on the criminal trial is conclusive of whether he is presently in such condition as to require confinement; no second inquiry into his present mental condition is necessary or proper. The constitutionality of this procedure has been affirmed.¹⁰¹

The Missouri statute differs from that of the other four of these states, in that it does not seem to make commitment on such verdict mandatory. The court may, on such verdict, order the person committed, if satisfied "that it would be unsafe to permit the prisoner to go at large," and if the prisoner is not a poor person. If he is a poor person, the court cannot commit him, but can only hold him over to the county court, and the order of commitment is made by the county court.¹⁰²

Giving the jury this power to find that the defendant was insane and irresponsible at the time of the act, but sane at the time of the verdict, gives twelve laymen power to set at liberty

⁹⁹ See pp. 268-269.

¹⁰⁰ See note 73.

¹⁰¹ *State v. Saffron* (1927) 146 Wash. 202, 262 Pac. 970.

¹⁰² Mo. Rev. Stat. (1929), §§3660, 8655-8657.

a person who has committed a criminal act, and who himself alleged that he was so insane as to be irresponsible at the time. Such a person is obviously dangerous when at liberty, unless it is clearly proved that he has completely recovered, and this can hardly be determined by a jury of laymen. The Washington statute contains a provision which helps to minimize this danger, authorizing the prosecuting attorney to cause a person so acquitted and discharged to be brought before the court for a special jury trial as to his mental condition, at which the evidence introduced on the criminal trial may be put in evidence, and the jurors who acquitted him of the crime may be required to testify as to the ground of the acquittal, and if the defendant is then found insane, he may be committed as a criminally insane person.¹⁰³ No such provision exists in any other state.

States Having no Statutory Provision for Disposition of Defendants Acquitted by Reason of Insanity. Georgia, Tennessee, Texas, Wyoming, and the Federal Government have no legislation to meet the situation where the jury acquits a defendant by reason of insanity.¹⁰⁴ The common law is therefore still in force in these jurisdictions. It seems that at common law, the judge had the power forthwith to order such defendant kept in confinement,¹⁰⁵ but the only place in which the judge had power to order him confined was the jail.¹⁰⁶ The Georgia court, however, in 1885 said that if the defendant succeeded in making out his defense of insanity, that would "entitle him to go without a day absolutely freed and discharged of the offense

¹⁰³ Wash. Comp. Stat. (Remington, 1922), §6974.

¹⁰⁴ See Digest, p. 294 *et seq.*

¹⁰⁵ *Comm. v. Merriam* (1810) 7 Mass. 168; *U.S. v. Lawrence* (1835) 4 Cranch C.C. 518, 26 Fed. Cas. No. 15,577.

¹⁰⁶ *Comm. v. Merriam*; *U.S. v. Lawrence*, both *supra*. In *U.S. v. Lawrence*, the defendant's counsel, before trial, had applied for a writ of *habeas corpus*, to have the defendant restrained as an insane person. This was refused, on the ground that even if satisfied that the prisoner was insane, the court had no power to do anything but to keep him in jail.

for which he was indicted."¹⁰⁷ The practice now followed in Georgia, however, is to regard the verdict of not guilty by reason of insanity as equivalent to the verdict of a lunacy commission, and automatically to commit the defendant thereupon.¹⁰⁸ In Texas, a person acquitted on this ground may have a complaint filed against him, and the issue of his mental condition is then tried to a jury. If found insane, he is incarcerated in the proper institution for the insane.¹⁰⁹

Due Process in Commitment Proceedings. Each of the methods which we have discussed for confining a person acquitted of crime by reason of insanity, must face the question, "Was the defendant committed in accord with 'due process'?" We have already discussed the question of constitutionality in connection with certain of these methods, particularly the statutes requiring automatic commitment, upon such verdict, and those authorizing such commitment in the discretion of the trial court. Here may be summarized the general constitutional principles governing the commitment of persons acquitted by reason of insanity.

A person acquitted of a crime on the ground that he was insane and irresponsible at the time of committing it is entitled to all his constitutional rights, just as if he had been acquitted for any other reason.¹¹⁰ Commitment to an insane institution deprives him of his liberty, and to be constitutional, the commitment must conform to the requirement of the Fourteenth Amendment. Due process in insanity proceedings does not necessitate a trial by jury,¹¹¹ but it does require a judicial hearing,

¹⁰⁷ *Danforth v. State* (1885) 75 Ga. 614. See also *Ballard v. State* (1886) 19 Neb. 609, 28 N.W. 271.

¹⁰⁸ See p. 299.

¹⁰⁹ Information to the writer from R. D. Cox, Jr., Assistant Attorney General of Texas.

¹¹⁰ *In re Boyett* (1904) 136 N.C. 415, 48 S.E. 789.

¹¹¹ *State v. Linderholm* (1911) 84 Kans. 603, 114 Pac. 857; *Dowdell Petitioner* (1897) 169 Mass. 387, 47 N.E. 1033.

at which the defendant has the right to be heard and to prove facts which would protect his liberty.¹¹²

The verdict in the criminal case does not of itself adjudicate the question of present mental condition and the need of confinement (except in the few states where the jury is required to state whether the defendant "still is" insane). The verdict finds only that the defendant was irresponsible *at the time of the act charged*. He may have recovered in the meantime; if so, there is no reason for confining him. Some states have accordingly held that before a defendant so acquitted may be committed as insane, the court must hold a hearing on the question of his present mental condition, and that unless a fair trial is had on that question, the commitment is invalid.¹¹³

Other courts, however, have upheld statutes which made no express provision for such a hearing, but left it in the judge's discretion to commit a defendant acquitted on the ground of insanity if he felt that such commitment was necessary or proper.¹¹⁴ The requirement of due process, these courts said, is met by these statutes because the evidence adduced at the criminal trial may be quite sufficient to show that the defendant is still insane; this evidence may have proved that the defendant was afflicted with a chronic, progressive, or incurable form of

¹¹² "Due process of law requires, that a party shall be properly brought into court, and that he shall have an opportunity when there, to prove any fact which, according to the constitution and the usages of the common law, would be a protection to him or his property." *People ex rel. Witherbee v. Supervisors* (1877) 70 N.Y. 228, 234. Perhaps the most famous definition is that of Webster, who stated in *Dartmouth College v. Woodward* (1819) 4 Wheat. 518, 581, that by "law of the land" is intended "a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." See also: *Hurtado v. People* (1883) 110 U.S. 516; *State v. Billings* (1894) 55 Minn. 467, 474, 57 N.W. 206, 794.

¹¹³ *In re Boyett*, *supra*; *Brown v. Urquhart* (1905) 139 Fed. 846. The latter case was reversed on another ground in *Urquhart v. Brown* (1906) 205 U.S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760.

¹¹⁴ See *ante*, note 89.

mental disorder, which could not have been cured in the interval since the act charged.¹¹⁵

Even the statutes which exclude any hearing whatever on the question of present mental condition, and require the trial court automatically to commit to an insane hospital all defendants acquitted by reason of insanity, have been held constitutional.¹¹⁶ These statutes require a practice which seems to have been generally followed at common law. In the older cases, upon an acquittal by reason of insanity, the trial court usually ordered the defendant committed, without any inquiry into the question of whether he continues to be insane.¹¹⁷

Right to Appeal from an Acquittal by Reason of Insanity. A question which has been very rarely discussed by the courts is whether a defendant who has been acquitted on a criminal charge by reason of insanity, may take an appeal. It was held in one case that such a verdict constitutes an acquittal, and that the verdict having eliminated responsibility for crime and having so ended the criminal proceeding, the statute alone governs, and since no appeal is provided for, no right to appeal exists.¹¹⁸

¹¹⁵ *People ex rel. Peabody v. Chanler* (1909) 133 App. Div. 159, 117 N.Y. Supp. 322; *State ex rel. Thompson v. Snell* (1907) 46 Wash. 327, 89 Pac. 931.

¹¹⁶ See *ante*, note 78.

¹¹⁷ *Hadfield's Trial* (1800) 27 How. St. Tr. 1281; *U.S. v. Lawrence* (1835) 4 Cranch C.C. 518, 26 Fed. Cas. No. 15,577; *Comm. v. Merriam* (1810) 7 Mass. 168. In *Jenisch's Case* (1875) 3 Abb. N.C. (N.Y.) 200, a woman charged with having burned her child to death was found by commissioners in lunacy, appointed under the statute, to have been epileptic and irresponsible at the time of the deed. The presiding justice thereupon approved their finding and ordered her removal to the lunatic asylum. In a note to the report, the state commissioner in lunacy stated that the commission made no finding as to present insanity, because the statute did not require it, and because the continuance of the insanity was to be legally presumed, the report of the commission being made less than two months after the commission of the offense, and there having been another seizure in the interval.

¹¹⁸ *Campbell v. Downer* (1915) 94 Kans. 674, 146 Pac. 1039.

The same reasoning is also followed in England, where, although the form of the verdict is "guilty but insane," it has been held that no appeal will lie, because the verdict is in effect an acquittal.¹¹⁹ The Mississippi court has also stated that it does not think such a verdict is reviewable.¹²⁰

On the other hand, the statute of the District of Columbia expressly provides that "the person whose sanity is in question shall be entitled to his bill of exceptions and an appeal as in other cases."¹²¹ And even without such provision, the Indiana Supreme Court has held that the order of the court committing the defendant to an insane hospital is a final judgment from which an appeal will lie, since it is essentially a judgment by which he is deprived of his liberty.¹²² The same view may perhaps be taken by the Illinois Supreme Court, which has said that the writ of error lies by force of the common law in any case in which personal liberty is involved.¹²³

Place of Confinement. Thirty-eight of the American jurisdictions provide that a defendant ordered committed upon an acquittal by reason of insanity is to be confined in a state hospital for the insane,¹²⁴ or, where special hospitals or wards for the criminal or dangerous insane exist, in such hospitals or wards.¹²⁵ In Rhode Island¹²⁶ and Washington,¹²⁷ such persons may be sent to the insane ward of the state prison.

¹¹⁹ Appeal of Felstead (1914) 10 Crim. App. Rep. 129.

¹²⁰ Caffey v. State (1900) 78 Miss. 645, 29 So. 396.

¹²¹ D.C. Code (1929), Title 6, §374.

¹²² Morgan v. State (1912) 179 Ind. 300, 101 N.E. 6.

¹²³ People v. Scott (1927) 326 Ill. 327, 352, 157 N.E. 247.

¹²⁴ Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Iowa, Kentucky, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, South Dakota, Utah, Vermont, Virginia, West Virginia. See Digest, p. 294 *et seq.*

¹²⁵ California, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, New York, Pennsylvania, Ohio, Wisconsin.

¹²⁶ See p. 322.

¹²⁷ See p. 328.

nals until adjudged "by the medical superintendent thereof, and the Board of Commissioners of Public Charities, a fit subject to be discharged." In Florida,¹⁴² the Board of Commissioners of State Institutions may discharge such a defendant upon parole, upon recommendation of the hospital authorities, but a judicial restoration to sanity can be had only by a proceeding in chancery. In Kansas, release from the asylum can be had only upon order of the state board of corrections.¹⁴³

Discharge by the Court or Judge. In thirteen states, the power to discharge such persons rests entirely in the court which committed them, or some other designated court.¹⁴⁴ Express provisions for application to the court for release, by the defendant or by someone else in his behalf, exist in half these states.¹⁴⁵ But some restrict the frequency with which such applications may be made. In California, application for release may not be made until after the person has been in confinement for at least a year, and if an application is unsuccessful, a subsequent application may not be made for another year. A similar provision exists in Indiana, where, however, the first application may not be made until after two years, and subsequent applications only at intervals of five years. Maine has no limitations upon the time when the first application may be made, but if that is denied, it may not be renewed until the expiration of one year. In Oklahoma, application cannot be made oftener than at intervals of six months. Such restriction upon the right to apply for release has been held constitutional.¹⁴⁶

¹⁴² See p. 299.

¹⁴³ See p. 303.

¹⁴⁴ California, Connecticut, Delaware, Indiana, Kentucky, Louisiana, Maine, Massachusetts (in cases other than murder and manslaughter), New Jersey, Pennsylvania, Vermont, Washington, Wisconsin. See Digest, p. 294 *et seq.*

¹⁴⁵ California, Connecticut, Indiana, Kentucky, Maine, Vermont, Wisconsin. Such application is also provided for in the Oklahoma act. Okla. Stat. (1931), §5065.

¹⁴⁶ *In re Slayback* (1930) 209 Cal. 480, 288 Pac. 769.

Trial by Jury. In Kentucky and Washington, a trial by jury is a prescribed part of the procedure for deciding the question of recovery. The Washington statute sets out an elaborate method for raising and adjudicating the question of recovery. When a person committed as insane after being acquitted of crime for that reason, seeks to be released, (1) he must apply to the physician in charge of the criminal insane for an examination as to his mental condition; (2) the physician must certify to the warden whether "there is reasonable cause to believe that such person has become sane since his commitment and is a safe person to be at large"; (3) if the physician does so certify, the warden permits the person to petition the court that committed him, praying for discharge; (4) the issue is then tried before a jury.

If he is entitled to a discharge, the jury must not only find that the defendant has "become sane" since his confinement, but also that he is not liable to a recurrence or relapse and is safe to be at large.

If such person is discharged, and later again becomes insane or unsafe to be at large, he may be recommitted, upon proceedings before a jury, instituted by the prosecuting attorney.

In Louisiana, when it is alleged that a person committed to a hospital because of insanity at the time of the commission of a crime has regained his reason, a rule to show cause why he should not be released is tried by the judge without a jury, or by a jury of five or twelve, according as the charge in the indictment is triable.¹⁴⁷

In Wisconsin, a jury trial may be demanded, but where no such demand is made, the question of recovery and the right to discharge may be determined by the court, or by the State Board of Control, acting as a commission in lunacy.¹⁴⁸

Discharge by Court on Recommendation of Medical Authori-

¹⁴⁷ See pp. 304-305.

¹⁴⁸ See p. 331.

ties. In four states, patients held upon the order of a court having criminal jurisdiction may be discharged by such court upon the certificate of recovery of the superintendent of the hospital.¹⁴⁹

The New Mexico law is unique in that it requires the superintendent to examine all inmates monthly, and certify to the proper judge the names of those found to be sane; the judge thereupon orders a formal discharge.¹⁵⁰ The requirement of a certificate from the hospital superintendent has been held not unconstitutional.¹⁵¹

In Ohio, a person acquitted by reason of insanity and committed to the state hospital, is not to be released "unless and until the judge of the court of common pleas of Allen County, Ohio, the superintendent of said Lima State Hospital and an alienist to be designated by said judge and said superintendent, or a majority of them, after notice and hearing, find and determine that said defendant's sanity has been restored, and that his release will not be dangerous." The discharge may be final or conditional, or the person may be released on parole.¹⁵²

In Rhode Island and Iowa, the discharge is by the court, after investigation by commissioners appointed by the court. The commissioners need not be alienists, or otherwise qualified to judge mental condition, except that one of them must be a physician.¹⁵³

Discharge Either by Court or Medical Authorities. The Colorado law provides that persons confined in the state insane hospital, when restored to sanity, shall be discharged by the superintendent.¹⁵⁴ However, the Colorado Supreme Court has decided that all judgments and orders under the lunacy act are of

¹⁴⁹ Michigan, Minnesota, New Mexico, and New York. See p. 294 *et seq.*

¹⁵⁰ N.M. Stat. (1929), §130-806.

¹⁵¹ *In re Clark* (1912) 86 Kans. 539, 121 Pac. 492.

¹⁵² See pp. 319-320.

¹⁵³ See pp. 303, 322.

¹⁵⁴ Colo. Comp. Laws (1921), §565.

a continuing character, and open to change or modification on application of any party in interest, and that the committing court can grant a final discharge of any person whom it has ordered confined.¹⁵⁵ It seems, therefore, that in Colorado such person may be discharged either by the superintendent, when he finds the person restored to sanity, or by the committing court, upon application.

In Oklahoma, also, it seems persons committed upon an acquittal of crime by reason of their insanity may be released either upon a judicial proceeding, or by the medical superintendent of the institution.¹⁵⁶

In New Hampshire (where the judge may commit a defendant acquitted by reason of insanity either to the insane asylum or to prison), if committed to the asylum, such person may be discharged "by the commission of lunacy, or by a justice of the superior court, whenever a further detention at the asylum is, in their opinion, unnecessary." The superior court or any justice thereof is also given the power to parole any person in the state hospital, "upon such terms and conditions as justice may require." If committed to prison, such person may be discharged by "the governor and council or the superior court," whenever they are satisfied that such discharge "will be conducive to the health and comfort of the person and the welfare of the public."¹⁵⁷

Release by Act of Legislature or by Governor. In Georgia and North Carolina, it is provided that a person acquitted of a capital crime on the ground of insanity and committed, is not to be discharged except by a special act of the legislature.¹⁵⁸ Persons acquitted of less than capital crimes on the ground of

¹⁵⁵ *Hultquist v. People* (1925) 77 Colo. 310, 236 Pac. 995, and cases cited, p. 297.

¹⁵⁶ See p. 320.

¹⁵⁷ N.H. Pub. Laws (1926), chap. 11, §§26, 28; chap. 369, §4.

¹⁵⁸ Ga. Penal Code (1926), §977; N.C. Code (1931), §6239.

insanity can be discharged only by warrant or order of the governor. The North Carolina Supreme Court, however, has held this provision unconstitutional, for the reason that it expressly deprived the person of the right of *habeas corpus*, and of a judicial determination of the cause of his detention.¹⁵⁹ The act has accordingly been amended by adding a proviso that "nothing in this section shall be construed to prevent such person . . . from applying . . . for a writ of *habeas corpus*."

The constitutionality of the Georgia act, which contains no such guarantee of the right to *habeas corpus*, has never been determined by the Georgia court.

In Massachusetts,¹⁶⁰ as has been said, defendants acquitted of murder or manslaughter on the ground of insanity are automatically committed to an insane hospital for life, and can only be discharged by the governor, with the advice and consent of the council, "when he is satisfied after an investigation by the department (of Mental Diseases) that such discharge will not cause danger to others." The discharge from the asylum of defendants acquitted of crimes other than murder or manslaughter seems to be in the control of the committing court.

The Massachusetts law also provides for the commitment of persons who have committed criminal acts, and who, while not legally insane and irresponsible, are nevertheless "defective delinquents." The provision for the discharge of such defective delinquents is interesting. Any person may apply to the local district court justice for the discharge of such a defective. A hearing is thereupon had; if the justice finds that the person probably can be allowed at large without serious injury to himself or others, he may order him paroled. At the end of one year, if the justice finds that the person can be permanently allowed at large without serious injury to himself, or damage, in-

¹⁵⁹ *In re Boyett* (1904) 136 N.C. 415, 48 S.E. 789, 67 L.R.A. 972, 103 A.S.R. 944.

¹⁶⁰ See p. 308.

jury, or annoyance to others, he may order him discharged. But if at any time during the year the judge becomes satisfied that the best interests of the inmate or of society require it, he may order the inmate recalled from parole. If the application for parole is denied, a new application may not be made within one year. Even after a final discharge has been granted, if the person is found to have committed a crime, he may be summarily recommitted.

In New Hampshire, defendants committed to prison may be discharged by the governor and council, or the superior court (we have already observed that in New Hampshire a defendant acquitted on the ground of insanity may be committed either to the asylum or to prison). If such defendant is committed to the asylum, it seems that the power of discharge is vested in a commission of lunacy, or any justice of the superior court, "whenever a further detention at the hospital is in their opinion unnecessary."¹⁶¹

Habeas Corpus. In almost a third of the states, there are no statutory provisions for the method of releasing persons confined in insane institutions after being acquitted of crime on the ground of insanity.¹⁶² In these jurisdictions, it seems that the inmate's only recourse, when he seeks to be released as sane, is the writ of *habeas corpus*.

The right to initiate judicial proceedings for discharge on recovery is essential to due process;¹⁶³ and a statutory procedure which denies the person this right, and which can be set in motion only by the hospital or penal authorities, is unconstitu-

¹⁶¹ N.H. Pub. Laws (1926), chap. 11, §§26, 28; chap. 369, §4.

¹⁶² Alabama, Arizona, District of Columbia, Idaho, Iowa, Montana, Nebraska, Nevada, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Wyoming. It may be that persons confined after an acquittal by reason of insanity are released in these states by the same procedure as non-criminal inmates. See Digest, p. 294 *et seq.*

¹⁶³ *In re Boyett* (1904) 136 N.C. 415, 48 S.E. 789, 67 L.R.A. 972, 103 A.S.R. 944.

tional.¹⁰⁴ However, courts are not prone to construe statutes requiring a certificate of recovery from the hospital superintendent, etc., as denying the defendant the right to institute proceedings.¹⁰⁵ Where the statute does provide for proceedings initiated by the person himself or his friends, it is held that the statutory procedure must be exhausted before *habeas corpus* may be resorted to.¹⁰⁶

Three or four states deny a defendant committed to the hospital upon acquittal by reason of insanity the right to have his recovery adjudicated upon writ of *habeas corpus*, the right to initiate proceedings under the statute being deemed sufficient. Thus in Florida, judicial restoration to sanity may be had upon a bill in chancery, and there is no right to proceed by *habeas corpus*.¹⁰⁷ In Wisconsin, the statute provides for a petition by the defendant or his friends for a judicial inquiry; but persons confined in the central state hospital (to which those acquitted of crime by reason of insanity are sent) are not entitled to the writ of *habeas corpus*.¹⁰⁸ The *habeas corpus* laws of some states provide that any person restrained of his liberty may prosecute the writ "except persons committed or detained by virtue of the final judgment or any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment," and it has been held that an adjudication of insanity is a final judgment, and that in such cases, the writ goes only to jurisdictional defects.¹⁰⁹ The Georgia act, providing that

¹⁰⁴ *Underwood v. People* (1875) 32 Mich. 1; *Doyle, Petitioner* (1889) 16 R.I. 537.

¹⁰⁵ *In re Clark* (1912) 86 Kans. 539, 121 Pac. 492.

¹⁰⁶ *In re Ostatter* (1918) 103 Kans. 487, 175 Pac. 377; *State v. Clifford* (1919) 106 Wash. 16, 179 Pac. 90.

¹⁰⁷ See p. 299.

¹⁰⁸ See p. 331.

¹⁰⁹ *State ex rel. Degen v. Freeman* (1926) 168 Minn. 374, 210 N.W. 14. But a petition for release may be addressed to the court if the superintendent of the institution refuses to act. Minn. Stat. (1927), §10723, as amended, Laws, 1931, chap. 364.

persons committed on acquittal by reason of insanity can only be discharged by the legislature (if acquitted of a capital crime), or by the governor (if acquitted of a lesser crime) also seems to exclude the right to *habeas corpus*.¹⁷⁰

In all but these few states, it seems that the right of a person confined as insane to have the question of his recovery determined upon a writ of *habeas corpus* is unquestioned,¹⁷¹ and a defendant committed to an insane institution upon an acquittal by reason of insanity may test the constitutionality of the statute under which he was committed,¹⁷² and raise the question of recovery and the right to discharge,¹⁷³ by *habeas corpus*. However, in accordance with the general rules governing the issuance of the writ, if an adequate remedy exists by way of appeal or writ of error, the writ of *habeas corpus* may be denied.¹⁷⁴

While the law respecting the use of the writ is largely statutory today, the majority of states have no special provisions regarding its use in insanity cases, but provide merely that it shall be available to anyone illegally restrained of his liberty. About a score of states, however, expressly provide for its use in in-

¹⁷⁰ See p. 300.

¹⁷¹ *Matter of Clary* (1906) 149 Cal. 732, 87 Pac. 580; *Devilbiss v. Bennett* (1889) 70 Md. 554, 17 Atl. 502; *Ex parte Dahrooge* (1921) 215 Mich. 90, 183 N.W. 716; *Northfoss v. Welch* (1911) 116 Minn. 62, 133 N.W. 82, 36 L.R.A. (N.S.) 578, Ann. Cas. 1913A 1257.

¹⁷² *People ex rel. Peabody v. Baker* (1908) 59 Misc. 359, 110 N.Y. Supp. 848; *People ex rel. Peabody v. Chanler* (1909) 133 App. Div. 159, aff'd, 196 N.Y. 525.

¹⁷³ *Devilbiss v. Bennett* (1889) 70 Md. 554, 17 Atl. 502; *Northfoss v. Welch* (1911) 116 Minn. 62, 133 N.W. 82, 36 L.R.A. (N.S.) 578, Ann. Cas. 1913A 1257; *People ex rel. Peabody v. Chanler* (1909) 133 App. Div. 159, aff'd, 196 N.Y. 525; *People v. Hendrick* (1915) 215 N.Y. 339, 109 N.E. 486; *People ex rel. Thaw v. Lamb* (1909) 118 N.Y. Supp. 389; *People ex rel. Thaw v. Grifenhagen* (1915) 154 N.Y. Supp. 965.

¹⁷⁴ *Urquhart v. Brown* (1906) 205 U.S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760; *In re Underwood* (1875) 30 Mich. 502; *In re McGuire* (1897) 114 Mich. 80, 72 N.W. 15.

sanity cases.¹⁷⁵ The Michigan, New York, and Oklahoma statutes provide that upon the return of the writ, the medical history of the person is to be given in evidence, and the medical superintendent sworn as a witness. In New Jersey, the medical director is entitled to appear and be heard. In a few states, including Michigan, New Jersey, New York, Rhode Island, and West Virginia, the statutes expressly provide that the court, in its discretion, may impanel a jury,¹⁷⁶ but a jury trial is not a matter of right,¹⁷⁷ except in Alabama.¹⁷⁸

The burden of proof is usually placed upon the applicant for release to establish his sanity.¹⁷⁹ In Pennsylvania, however, on return of the writ of *habeas corpus*, the burden is on those restraining a person of his liberty to prove his insanity.¹⁸⁰

§6. TREND OF THE LAW

The Growing Resort to Procedural Reforms. A study such as we have made in this chapter, of the laws of the various states governing procedure in criminal cases where the defense of insanity is raised, shows a significant recent tendency, namely, the tendency to resort to statutory innovations in procedure for the purpose of improving the efficiency of the law in handling these cases. In 1843, when the sensational assassination of the secre-

¹⁷⁵ Alabama, Connecticut, Kansas, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, West Virginia. See Digest, p. 294 *et seq.*

¹⁷⁶ See Digest, p. 294.

¹⁷⁷ People *ex rel.* Thaw *v.* Grifenhagen (1915) 154 N.Y. Supp. 965; *Ex parte* Dagley (1912) 35 Okla. 180, 128 Pac. 699.

¹⁷⁸ Ala. Code (1928), §4307.

¹⁷⁹ Cal. Penal Code (1931), §1026a; Wash. Comp. Stat. (Remington, 1922), §6970; People *ex rel.* Peabody *v.* Chanler (1909) 133 App. Div. 159, *aff'd*, 196 N.Y. 525; People *ex rel.* Thaw *v.* Lamb (1909) 118 N.Y. Supp. 389; *Ex parte* Remus (1928) 119 Ohio 166, 162 N.E. 740; Palmer, Petitioner (1904) 26 R.I. 222, 58 Atl. 660.

¹⁸⁰ Pa. Stat. (1920), §14294.

tary to Sir Robert Peel by the deluded Daniel M'Naghten focused popular attention on the problem, the judges of England were asked to clarify the law by answering certain questions regarding the measure of responsibility of persons suffering from such delusions. Today, instead of turning to the judiciary, we ask the legislature to pass a law on the subject. And the legislation demanded is nowadays rarely concerned with the substantive law, governing the "tests" of criminal responsibility, but in most instances is designed to attack the problem from the procedural side. The consensus of opinion among students of the problem seems to be that it is the machinery by which we try these cases that most needs attention,¹⁸¹ and it is not surprising to find that a number of the reforms which have been suggested have been enacted into law in a few states.

Special Plea and Separation of the Issues. In Chapter V we called attention to the fact that several states in recent years have enacted statutes providing for the appointment of expert witnesses to examine accused persons whose mental responsibility is questioned, or for the commitment of such accused persons to an insane institution for a period of observation. The purpose of such legislation, of course, is to assist the judge and jury in the difficult task of determining the defendant's mental condition. The same object of facilitating the inquiry is found in the provisions, discussed in this chapter, requiring a special plea of insanity, where that defense is intended to be raised, and even more directly in the provision now found in four states requiring a separate trial of that issue. Separation of the issues was provided for in Wisconsin in 1878, but abandoned in 1911.¹⁸² However, California and Colorado in 1927, Louisiana in 1928, and Maryland in 1931, enacted statutes which, although they differ materially, agree in providing that where the question is raised of the defendant's responsibility by reason of mental unsound-

¹⁸¹ See Chapter VIII for discussion of suggested reforms.

¹⁸² See Digest, p. 330, note 9.

ness, that issue must be tried separately from the other issues in the case, if any.¹⁸³

A second and quite different purpose is found in such legislation as that of Louisiana. There, the aim was not merely to facilitate the judicial determination of the insanity issue, but to eliminate judicial proceedings entirely in such cases, wherever possible, and substitute therefor a scientific investigation. Earlier attempts in this direction had been held unconstitutional. The Louisiana law, however, carefully preserves all the defendant's constitutional rights. If he enters a plea of not guilty by reason of insanity, he is first examined by a commission of experts. If this commission finds that he is in fact mentally irresponsible, he is forthwith committed to an institution for the insane and no judicial trial is necessary. If the commission decides that he is responsible, the defendant still retains the right to submit that issue to a jury.¹⁸⁴ The social efficiency of such procedure, especially in cases where the person is clearly mentally irresponsible, is obvious.

Restriction on Right to Apply for Release. Another provision deserving of mention is that adopted in 1927 in two states, California and Indiana, restricting the right of a person committed to a mental institution upon an acquittal of crime by reason of insanity, to apply for release as recovered.¹⁸⁵ The California law allows such application to be made only after one year, and if release is denied on such application, on the ground that the insanity still continues, the application may not be renewed until after another year. The Indiana act is stricter yet, forbidding any application for discharge for at least two years after commitment, and if that is unsuccessful, permitting renewed applications only at intervals of five years. The purpose of such legislation, of course, is to prevent too oft repeated applications for release. Since an adjudication that a person is at any given time still in-

¹⁸³ See Digest, p. 294 *et seq.*

¹⁸⁴ See Digest, pp. 304-305.

¹⁸⁵ See p. 282.

sane, is not *res adjudicata* of his condition the moment following, a persistent person can present one application as soon as the former one is denied. The extent to which this right may be exercised, in the absence of restrictions, is illustrated in the Thaw Case.¹⁸⁶

As we shall see in the next chapter, the tendency to resort to legislation for improving our judicial procedure extends not only to the procedure for determining the defendant's mental responsibility at the time of the act charged, but also to the procedure for determining his present mental condition at the time of the proceedings.

¹⁸⁶ *New York State Bar Ass'n Reports* (1910), vol. xxxiii, p. 391 *et seq.*

DIGEST

PLEADING AND PROCEDURE IN CRIMINAL CASES
INVOLVING THE DEFENSE OF MENTAL
IRRESPONSIBILITY

FOLLOWING is a summary of the methods adopted in each jurisdiction for pleading and trying the defense of insanity; for determining whether a defendant acquitted for that reason should be confined; and for effecting his release upon recovery.

The provisions for determining the question of *present* insanity, at the time of trial, judgment, or execution, are discussed in the next chapter.

ALABAMA

Pleading. Defense of insanity must be set up by a special plea of "not guilty by reason of insanity," interposed at the time of arraignment. It cannot be raised under the general issue. Code (1928), §4573. In the absence of such special plea, evidence as to insanity is not admissible. Parrish *v.* State (1903) 139 Ala. 16, 36 So. 1012. Nor may argument be made on the subject. Walker *v.* State (1890) 91 Ala. 76, 9 So. 87.

Failure to enter the special plea at the time of arraignment forfeits the right, and its acceptance thereafter is in the discretion of the trial court. Morrell *v.* State (1902) 136 Ala. 44, 34 So. 208; Baker *v.* State (1923) 209 Ala. 142, 95 So. 467. This rule does not violate defendant's constitutional right to be heard by himself or counsel. Rohn *v.* State (1914) 186 Ala. 5, 65 So. 42.

Form of Verdict. If it appear that the defendant did the act but was insane at the time, "the jury shall render a special verdict to the effect that the defendant is not guilty by reason of insanity." Code (1928), §4574. Under this statute, a verdict of not guilty entitles the defendant to immediate enlargement, but a verdict of "not guilty by reason of insanity" is the basis for a judgment committing him to an insane asylum. Maxwell *v.* State (1889) 89 Ala. 150, 7 So. 824.

Procedure on Acquittal or Failure to Indict. When a person has escaped indictment or been acquitted by reason of insanity, the court, being informed by the jury or otherwise of the fact, "must carefully

inquire and ascertain whether his insanity in any degree continues, and if it does, shall order him in safe custody, and to be sent to the hospital." Code (1928), §4578.

Procedure for Release on Recovery. No statutory provision. The right to *habeas corpus* is preserved to all persons confined as insane, and the petitioner may demand a jury trial to determine whether he is still insane. An adverse decision does not bar a second application. Code (1928), §4307.

ARIZONA

Pleading. Defense of insanity is raised under the general issue.

Form of Verdict. If "acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be 'not guilty by reason of insanity.'" Rev. Code (1928), §5084.

Procedure on Acquittal. On such verdict, court may order a jury to be summoned, to inquire whether the defendant continues to be insane. If the jury find him insane, he is committed to the insane asylum, otherwise he is discharged. Rev. Code (1928), §5073.

Procedure for Release on Recovery. No special provision. "Any patient who is not insane" may be discharged from the asylum by the board of control. Rev. Code (1928), §2935.

ARKANSAS

Pleading. The defense of insanity is raised under the general issue. There is no special plea of "not guilty by reason of insanity." *Bolling v. State* (1891) 54 Ark. 588, 16 S.W. 658.

Form of Verdict. The jury must be instructed, if they acquit on the ground of insanity, to state the fact in their verdict. Dig. Stat. (Crawford & Moses, 1921), §3215.

Procedure on Acquittal. On such verdict, the trial judge in his discretion may certify the fact to the superintendent of the state hospital for nervous diseases, who thereupon must admit such person into the hospital. Dig. Stat. (Crawford & Moses, 1921), §§ 9413, 9414. The certificate of the judge is *prima facie* evidence of insanity, but the defendant can demand a jury trial in the probate court to determine his mental condition at that time. (Information to the writer from the Attorney General of Arkansas.)

Procedure for Release on Recovery. The determination of such patient's recovery, it seems, is vested in the superintendent of the hospital. Dig. Stat. (Crawford & Moses, 1921), §§9415, 9416.

CALIFORNIA

Pleading. Special plea required. A defendant who does not plead "not guilty by reason of insanity" is conclusively presumed to have been sane at the time of the offense, "provided that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged." Penal Code (1931), §1016.

Separate Trial of Insanity. The issue of irresponsibility by reason of insanity is tried separately, *after* the other issues in the case, if any. On the trial of these other issues, the defendant is conclusively presumed to have been sane at the time of the act. If the jury finds him "guilty" on this trial, or if no defense but insanity is raised, the trial of the issue of insanity is held, before the same or a new jury, in the discretion of the court. The jury shall find whether he was sane or insane at the time of the act charged. Penal Code, §1026. This procedure has been held constitutional. *People v. Hickman* (1928) 204 Cal. 470, 268 Pac. 909; *People v. Troche* (1928) 206 Cal. 35, 273 Pac. 767; *People v. Leong Fook* (1928) 206 Cal. 64, 273 Pac. 779; *People v. Marshall* (1930) 209 Cal. 540, 289 Pac. 629; *People v. Lamey* (1930) 103 Cal. App. 66, 283 Pac. 848.

Procedure on Verdict. If the jury finds that the defendant was insane at the time of the act, "the court, unless it shall appear to the court that the defendant has fully recovered his sanity," shall order him confined in the hospital for the criminal insane. If it appears he has fully recovered, the defendant is remanded to the custody of the sheriff "until his sanity shall have been finally determined in the manner prescribed by law." Penal Code, §1026.

Procedure for Release on Recovery. Such inmate is not released until the court finds that his sanity has been restored. *Ibid.* Application may be made for release, but only after confinement for at least one year, and if then found not restored, he cannot again apply until after another year. The burden of proving recovery on such hearing

is on the applicant. Penal Code, §1026a. This provision for detention for one year is reasonable and valid. *In re Slayback* (1930) 209 Cal. 480, 288 Pac. 769.

COLORADO

Pleading. Defense of insanity must be pleaded specially, "as a specification to the plea of 'not guilty.'" Laws, 1927, chap. 90, §1.

Commitment for Observation. Upon such plea, the court is required to commit defendant to the psychopathic hospital or the state insane hospital, for observation for a period not to exceed one month. *Ibid.*, §2.

Separate Trial. The issue of insanity may be tried separately, before the other issues in the case, or together with them, in the discretion of the court. *Ibid.*, §3.

Form of Verdict. When the specification of insanity is made, "the jury shall be given a form with the words 'not guilty by reason of insanity.'" *Ibid.*, §4.

Procedure on Acquittal. A defendant acquitted by reason of insanity is forthwith confined in the state hospital. *Ibid.*

Procedure for Release on Recovery. The superintendent has power to discharge inmates of the hospital. Comp. Laws (1921), §565. He may also issue a probationary discharge. *Metaxos v. People* (1924) 76 Colo. 264, 230 Pac. 608. Furthermore, all judgments and orders under the lunacy act are continuing in character, and the committing court may at any time change or modify such order, and may order a discharge. *In re Rainbolt* (1918) 64 Colo. 581, 172 Pac. 1068; *People v. Musser* (1924) 75 Colo. 257, 225 Pac. 218; *Hultquist v. People* (1925) 77 Colo. 310, 236 Pac. 995.

CONNECTICUT

Pleading. Defense of insanity is raised under the general issue.

Form of Verdict. Not expressly provided for.

Procedure on Acquittal. Upon a verdict of acquittal on the ground of insanity, the court may order the defendant confined in a state hospital "for such time as such court shall direct," unless some person shall give bond to confine such person as the court shall order. Gen. Stat. (1930), §6432.

Procedure for Release on Recovery. If the court orders the defendant confined for a specific term, and if at the end of that term he is still insane, the superintendent shall notify the state's attorney, who shall procure from the court an order for further confinement. Gen. Stat. (1930), §6434. A second method of procuring discharge is by petition, presented by defendant or the officers of the institution, served upon the selectmen of the town, the state's attorney, and the person, if any, upon whom the offense was committed. On such petition, the court shall make such order as to the defendant's disposal as shall seem proper. Gen. Stat. (1930), §6433.

The right to the writ of *habeas corpus* is guaranteed to insane persons. Gen. Stat. (1930), §1738. But this does not apply to persons convicted of or charged with crime. Gen. Stat. (1930), §1771.

DELAWARE

Pleading. General issue. No special plea of insanity is provided for.

Form of Verdict. If insanity is proved, "it shall be the duty of the jury to return a verdict of 'not guilty by reason of insanity.'" Rev. Code (1915), §2606.

Procedure on Acquittal. Upon such verdict, the court, upon motion of the Attorney General, may order the defendant to be forthwith committed to the state hospital. *Ibid.*

Procedure for Release on Recovery. The committing court may order him set at large, "whenever it shall be satisfied that the public safety will not thereby be endangered." *Ibid.*

DISTRICT OF COLUMBIA

Pleading. No special plea of insanity is provided for.

Form of Verdict. If the jury acquits on the *sole* ground that the defendant was insane at the time of the act, that fact shall be set forth in their verdict. Code (1929), Title 6, §374.

Procedure on Acquittal. On such acquittal on the ground of insanity, "the court may certify the fact to the Secretary of the Interior, who may order such person to be confined in the hospital for the insane." The defendant has the right to his bill of exceptions and an appeal. *Ibid.*

Procedure for Release on Recovery. No provision.

FLORIDA

Pleading. No special plea is provided for. Issue of insanity is triable under a plea of not guilty. *Johnson v. State* (1909) 57 Fla. 18, 49 So. 40.

Form of Verdict. When defendant is acquitted for insanity, "the jury, in giving their verdict of not guilty, shall state that it was given for such cause." Comp. Gen. Laws (1927), vol. iv, §8399. The court need not inform the jury what will be done with the defendant if they acquit him because of insanity. "With their verdict their connection with the case ceased," and the future disposition of the defendant is left to the court. *Williams v. State* (1903) 45 Fla. 128, 34 So. 279.

Procedure on Acquittal. Upon such verdict, "if the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the people," it shall order him confined in jail, or otherwise cared for as an insane person, or may give him into the care of friends, on their giving satisfactory security for his proper care; otherwise he shall be discharged. Comp. Gen. Laws (1927), vol. iv, §8399.

Procedure for Release on Recovery. A person can be restored to judicial sanity only by bill in chancery. Comp. Gen. Laws (1927), vol. ii, §5036. However, the Board of Commissioners of State Institutions may discharge him on parole, on recommendation of the hospital authorities. A person has no right to have his sanity determined by proceeding in *habeas corpus* (information received from Mr. Fred Davis, Attorney General of Florida).

GEORGIA

Pleading. No special plea is required or permitted. Defense of insanity must be made under general plea of not guilty. *Danforth v. State* (1885) 75 Ga. 614; *Alford v. State* (1911) 137 Ga. 458, 73 S.E. 375.

Form of Verdict. No special verdict provided for.

Procedure on Acquittal. No statutory provision. Acquittal by reason of insanity, said the Georgia court in 1885, would "entitle him to go without a day absolutely freed and discharged of the offense for which he was indicted." *Danforth v. State*, 75 Ga. 614. As a matter of

fact, however, it seems that such verdict is regarded as equivalent to finding of a lunacy commission, and defendant is automatically committed (Glueck, *Mental Disorder and the Criminal Law*, p. 398).

Procedure for Release on Recovery. A defendant committed upon acquittal of a capital crime cannot be discharged from the insane hospital except upon special act of the legislature. If the crime was not capital, he may be discharged by the governor. Penal Code (1926), §977.

It seems this statute, by implication, denies such defendants the right to have their recovery determined by *habeas corpus*. An almost identical statute was held unconstitutional in North Carolina on this ground. *In re Boyett* (1904) 136 N.C. 415, 48 S.E. 789.

IDAHO

Pleading. Insanity is a defense under the plea of not guilty. Comp. Stat. (1919), §8883.

Form of Verdict. When a defendant is acquitted on the ground that he was insane at the time of the act, "the verdict must be 'not guilty by reason of insanity.'" Comp. Stat. (1919), §8990.

Procedure on Acquittal. Upon such verdict, the court may order another jury to be summoned, to inquire whether the defendant continues to be insane. The same witnesses may be called, and other witnesses, and counsel may appear. If found insane, defendant is committed to the state insane asylum; if found sane, he is discharged. Comp. Stat. (1919), §9005.

Procedure for Release on Recovery. No statutory provision.

ILLINOIS

Pleading. No special plea. Insanity is a defense under the general issue.

Form of Verdict. If it appear that the defendant committed the act charged, but was insane at the time, the jury should so find, and "shall further find whether such person has or has not entirely and permanently recovered from such lunacy or insanity." Rev. Stat. (Smith-Hurd, 1931), chap. 38, par. 592.

Procedure on Acquittal. Upon a verdict that the defendant was insane at the time of the act, and has not entirely and permanently recovered, the court must order him committed to an insane hospital. If found entirely and permanently recovered, he is discharged. *Ibid.* However, it is elsewhere provided (Rev. Stat. [Smith-Hurd, 1931], chap. 23, par. 99) that "when a person shall be acquitted on trial of the crime of murder, attempt at murder, rape, attempt at rape, highway robbery or arson, on the ground of insanity," the judge shall order his removal to the state asylum for insane criminals. No mention is made in this section of the possibility of a verdict that defendant was insane at the time of the crime, but has since recovered.

Procedure for Release on Recovery. The latter provision (chap. 23, par. 99) adds that a defendant acquitted of any of the enumerated crimes on the ground of insanity is to remain in the asylum for insane criminals "until restored to his right mind and be adjudged by the medical superintendent thereof, and the Board of Commissioners of Public Charities, a fit subject to be discharged." Defendants sent to other insane hospitals may be discharged by the superintendent, but when he discharges a person committed on such acquittal, he must notify the state's attorney in charge of the case. Rev. Stat. (Smith-Hurd, 1931), chap. 85, par. 38.

INDIANA

Pleading. Defense of insanity must be set up specially in writing. Ann. Stat. (Burns, 1926), §2231. But this written plea may be interposed subsequent to arraignment. *Barber v. State* (1925) 197 Ind. 88, 149 N.E. 896. If such special plea is not made, evidence that the defendant was insane is not admissible. *Walker v. State* (1893) 136 Ind. 663, 36 N.E. 356. Nor can a new trial be granted on the ground of newly discovered evidence of insanity, where the plea of insanity had not been made at the trial. *Donahue v. State* (1905) 165 Ind. 148, 74 N.E. 996; *Hopkins v. State* (1913) 180 Ind. 293, 102 N.E. 851. However, even when the special plea is not interposed, it seems that evidence of insanity is always admissible *in mitigation*, though not as a complete defense. *Sage v. State* (1883) 91 Ind. 141; *Donahue v. State, supra*; *Hopkins v. State, supra*.

Form of Verdict. Whenever the plea of insanity is interposed, the jury (or the court, where no jury is used) must find whether the defendant committed the act charged and, if so, whether he was sane or not at the time, and "whether not guilty because he was insane at the time of the commission of the act." Ann. Stat. (Burns, 1926), §2292.

Procedure on Acquittal. Upon an acquittal by reason of insanity, "the court shall find as to the defendant's sanity at the time of the trial," and if it finds him then insane, or sane but that a recurrence of the insanity is probable, he shall be ordered committed to the proper institution for the criminal insane. Ann. Stat. (Burns, 1926), §2293. The court need not inform the jury what disposition will be made of the defendant upon a verdict of not guilty by reason of insanity, but counsel may call the jury's attention to the statutory provision, in argument. *Copenhagen v. State* (1902) 160 Ind. 540, 67 N.E. 453. The order of the court, committing defendant to an insane institution, is a final judgment, from which an appeal will lie. *Morgan v. State* (1912) 179 Ind. 300, 101 N.E. 6.

Procedure for Release on Recovery. At any time after two years, a defendant so committed may file application for discharge, in the court where committed, and upon "satisfactory proof" of recovery, and that a recurrence is improbable, the court shall order a discharge. If the first application is denied, subsequent applications can be made only at intervals of five years. Ann. Stat. (Burns, 1926), §2294, as amended, Acts, 1927, chap. 102.

IOWA

Pleading. No special plea is provided for. Insanity is a defense under not guilty pleaded. *State v. Cooper* (1915) 169 Ia. 571, 151 N.W. 835.

Form of Verdict. If the defense is insanity, the jury must be instructed, if it acquits on that ground, to state that fact in its verdict. Code (1931), §13932.

Procedure on Acquittal. Upon such verdict, the court, if the defendant is in custody, and his discharge is found dangerous to the public peace and safety, may order him committed to the insane hos-

pital or retained in custody, until he becomes sane. Code (1931), §13932.

Procedure for Release on Recovery. Complaint may be filed by "any person" alleging that a named person is not insane and is unjustly restrained, whereupon the court must appoint a commission of not more than three, one of them a physician, and another, if more than one, a lawyer. The commission must make "a thorough and discreet" examination, and make report to the judge in writing, accompanied by the written statement of the case signed by the superintendent. If the judge thereupon finds the person sane, he shall order his discharge; otherwise he shall order his continued detention. These proceedings may not be instituted until the person has been in the hospital for six months, nor oftener than once in six months thereafter. Code (1931), §§3571-3576. However, *habeas corpus* proceedings may be brought without limitation. Code (1931), §3577.

KANSAS

Pleading. Insanity is a defense under the general issue.

Form of Verdict. When defendant is acquitted on the ground of insanity, "the jury shall so state in the verdict." Rev. Stat. (1923), §62-1532.

Procedure on Acquittal. Upon such verdict, the court shall forthwith commit the defendant to the asylum. *Ibid.* This provision has been held constitutional. *In re Clark* (1912) 86 Kans. 539, 121 Pac. 492; *In re Beebe* (1914) 92 Kans. 1026, 142 Pac. 269. There is no right to an appeal from an acquittal by reason of insanity and commitment thereon, for there can be no appeal from an acquittal. *Campbell v. Downer* (1915) 94 Kans. 674, 146 Pac. 1039.

Procedure for Release on Recovery. A person committed upon a verdict of not guilty by reason of insanity may be liberated only upon order of the Board of Corrections, after a hearing and finding that he is wholly recovered, and that no person will be endangered by his discharge. Rev. Stat. (1923), §62-1532.

The writ of *habeas corpus* is available for the protection of insane persons. Rev. Stat. (1923), §60-2223. If the board corruptly or oppressively withholds a discharge from a person who has recovered, it

seems he may resort to *habeas corpus*. *In re Clark*, *supra*. But he must first initiate proceedings under the statute, and *habeas corpus* will be allowed only if the statutory remedy has been exhausted. *In re Ostatter* (1918) 103 Kans. 487, 175 Pac. 377.

KENTUCKY

Pleading. No special plea. Insanity is a defense under the plea of not guilty.

Form of Verdict. If the defense be insanity, the jury must be instructed, if they acquit on that ground, to state the fact in their verdict. Codes (Carroll, 1927), Crim. Code of Prac., §268.

Procedure on Acquittal. Thereupon, if the court, on hearing evidence, be satisfied that he is still insane, it may order him taken to a lunatic asylum. *Ibid*.

Procedure for Release on Recovery. Such person may not be discharged until found cured, on an inquest by jury in the court which committed him. Stat. (Carroll, 1930), §216aa-95.

LOUISIANA

Failure to Indict Because of Insanity. Whenever the grand jury omits to find a bill by reason of the insanity of the accused, it must certify the fact to the court. Ann. Rev. Stat. (Marr, 1915), §2322. Whenever a person is acquitted¹ or not indicted by reason of his mental derangement, and the court deems his discharge or going at large dangerous to the safety of the citizens or the peace of the State, it may commit such person to a hospital or institution, until restored or otherwise delivered by due course of law. Ann. Rev. Stat. (Marr, 1915), §3476.

Pleading. Special plea. The issue on this plea is tried before trial on the plea of not guilty, and no evidence of insanity is admissible on the trial of the plea of not guilty. Code of Crim. Proc., art. 267; *State v. Harville* (1930) 170 La. 991, 129 So. 612.

¹ As to procedure upon an acquittal by reason of insanity, this section has been superseded by section 268 of the Code of Criminal Procedure adopted in 1928. But the code does not deal with the situation where the grand jury fails to indict because of the insanity of the accused, and as to that situation, it seems this provision is still in effect.

Examination by Commission. When a plea of insanity is made, the judge must notify the parish coroner and the two superintendents of the state insane hospitals, these three to form a commission of lunacy to inquire into defendant's sanity, both at the time of the act and presently, and file a written report to the court. If a majority of the commission find defendant insane, either at time of the act charged or presently, he is forthwith committed to the criminal ward of a hospital for the insane. If the commission finds that defendant was at the time of the act, and is, sane, a judicial trial is had on the plea of insanity. Code of Crim. Proc., art. 268.

Trial on Insanity Plea. The issue of insanity is tried by the judge without a jury, or by a jury of five or twelve, according as the charge on the indictment would be tried. If he is found insane, he is committed to the criminal ward of an insane hospital. If found sane, he is tried on the other issues determining guilt or innocence. *Ibid.*, arts. 269, 271.

No ruling of the court made during the trial of the insanity plea is reviewable until after sentence. *Ibid.*, art. 273. The procedure provided in these articles of the code is constitutional. *State v. Burris* (1929) 169 La. 520, 125 So. 580; *State v. Toon* (1931) 172 La. 631, 135 So. 7.

Procedure on Recovery. When it is alleged that a person so committed has regained his reason, a rule to show cause why he should not be released is tried by the judge or by a jury of five or twelve, according as the charge on the indictment is triable. *Ibid.*, art. 273.

MAINE

Pleading. Statute does not require insanity to be pleaded specially, but seems to contemplate such a special plea. Rev. Stat. (1930), chap. 149, §1.

Commitment for Observation. "If a plea of insanity is made in court," or if the judge is notified that it will be made, he may order defendant into the care of the superintendent of an insane hospital, for detention and observation, "until further order of court, that the truth or falsity of the plea may be ascertained." The superintendent is required, at the beginning of each term so long as the person re-

mains so confined, to report to the judge whether his detention is longer required for purposes of observation. *Ibid.*

Form of Verdict. When the grand jury omit to find an indictment, by reason of the person's insanity, they shall certify that fact to the court; and when a traverse jury acquit a person for the same reason, they shall state the fact to the court when they return their verdict. Rev. Stat. (1930), chap. 149, §2.

Procedure on Acquittal or Failure to Indict. Thereupon, the court may commit the person to the department for criminal insane at the state hospital. *Ibid.*

Procedure for Release on Recovery. Such person may be released by the court having jurisdiction of the case, or by any supreme court justice, "on satisfactory proof that his discharge will not endanger the peace and safety of the community," or he may be committed to the custody of a friend, by any supreme court justice, on bond, etc. Rev. Stat. (1930), chap. 149, §§2, 3.

Persons in execution upon legal process, criminal or civil, are not entitled to the writ of *habeas corpus* as a matter of right. Rev. Stat. (1930), chap. 113, §5. However, application may be made for release to any justice of the supreme judicial court, in behalf of a person committed to the department for criminal insane at the state hospital. The justice, after inquiry and hearing, may vacate the commitment. If unsuccessful, the application may not be renewed until after the expiration of one year. Rev. Stat. (1930), chap. 149, §11.

Recommitment after Discharge. If, after discharge, such person is "on satisfactory proof" again found insane and dangerous, any justice of the supreme court may recommit him. Rev. Stat. (1930), chap. 149, §§2, 3.

MARYLAND

Pleading. No express provision for a special plea, but it seems such plea is contemplated. Ann. Code (1924), art. 59, §6, as amended, Laws, 1931, chap. 436, p. 1108.

Separate Trial of Insanity. Whenever a defendant pleads "not guilty by reason of insanity," or whenever the possibility of this defense is suggested to the court by either the defense or the prosecution, the court must hold a jury hearing, to determine defendant's

sanity, both at the time of the offense and at the time of the hearing. *Ibid.*

Procedure on Verdict. If found insane both at the time of the offense and at the time of the hearing, the court must commit him to a hospital, almshouse, or other suitable place; if found to have been sane at the time of the offense but presently insane, he must be committed until he recovers, when he may be tried upon the indictment; if insane at the time of the offense but presently sane, he must be discharged; if sane both at the time of the act and presently, he is tried upon the indictment, and on such trial either side may introduce the jury's verdict on the sanity hearing. *Ibid.*

If, on the sanity hearing, the defendant is found sane both at the time of the act and at the time of hearing, and thereafter introduces evidence to prove mental incapacity, on the trial on the indictment, the jury need not say by its verdict whether the defendant was or is sane or insane. *Ibid.* This last provision was probably added to negative a contrary rule adopted in *Price v. State* (1930) 159 Md. 491, 151 Atl. 409.

Procedure on Recovery. Persons committed because of their insanity at the time of committing an offense cannot be said to be "under criminal charge," and so must be treated like insane persons committed under civil process. *Wagner v. Baltimore* (1919) 134 Md. 305, 106 Atl. 753. Persons not under criminal charge may be discharged by the superintendent or chief medical officer of the hospital. Ann. Code (1924), art. 59, §43.

Habeas corpus proceedings are also available to effect discharge, "upon satisfactory proof of permanent or temporary recovery." Ann. Code (1924), art. 59, §7.

MASSACHUSETTS

Failure to Indict Because of Insanity. When the grand jury does not indict because of insanity, they must certify the fact to the court, which, if satisfied defendant is insane, may order him committed to an insane hospital, "under such limitations as it may order." Gen. Laws (1921), chap. 277, §16.

Pleading. No special plea required.

Form of Verdict. When a defendant tried for a crime other than murder or manslaughter is acquitted by reason of insanity, "the jury shall state that fact to the court." Acts, 1921, chap. 262, §13. There is no such express provision for the case where the defendant is acquitted of murder or manslaughter.

Procedure on Acquittal. A defendant acquitted of murder or manslaughter by reason of insanity must be committed by the court to an insane hospital for life. Gen. Laws (1921), chap. 123, §101, as amended, Acts, 1923, chap. 467, §3; *Gleason v. West Boylston* (1884) 136 Mass. 489. A defendant acquitted of any other crime by reason of insanity may be committed by the court, "if satisfied that he is insane." Gen. Laws (1921), chap. 278, §13, as amended, Acts, 1921, chap. 262.

Except in cases involving the death penalty or life imprisonment, a defendant may also, on application of the district attorney, probation officer, or officer of the department of mental diseases, be committed as a defective delinquent, if the court on such application finds he is mentally defective, but not a proper subject for commitment as a feeble-minded or insane person. Acts, 1921, chap. 270, §1.

Procedure for Release on Recovery. Persons acquitted of murder or manslaughter by reason of insanity and thereupon committed for life, may be discharged by the governor, with the advice and consent of the council, when he is satisfied after an investigation by the department of mental diseases that such discharge will not cause danger to others. Gen. Laws (1921), chap. 123, §101, as amended, Acts, 1923, chap. 467, §3. The order of commitment of persons acquitted of any other crime by reason of insanity may be revised or revoked by the court at any time, as it may deem proper. Acts, 1921, chap. 262.

Application may also be made "by any person" for discharge of any inmate. On such application, any justice of the supreme judicial court must grant a hearing, and may impanel a jury. If found not insane, or not dangerous, the person is discharged. Gen. Laws (1921), chap. 123, §§91-93. This procedure is not, it would seem, available to defendants committed for life, upon acquittal of murder or manslaughter by reason of insanity.

Defendants confined as defective delinquents may be discharged on hearing by the local district court, held upon application of any

person. If the judge on this hearing finds the person may be allowed at liberty without serious injury to himself or others, he shall order him paroled. At the end of one year, a permanent discharge may be granted, but if at any time during the year the court becomes satisfied that the individual's or the public's interests require his recall from parole, it may order such recall. Even after permanent discharge, the person may be summarily recommitted as a defective delinquent by any court, if it finds that he has committed any crime. Gen. Laws (1921), chap. 123, §119.

MICHIGAN

Pleading. No special plea is required, but notice must be served on prosecution of intent to raise insanity defense. Mich. Comp. Laws (1929), §§17313, 17314.

Form of Verdict. There is no express requirement that a jury acquitting a defendant by reason of insanity must state the fact in its verdict. It is held a jury cannot be compelled to return a special verdict. *Underwood v. People* (1875) 32 Mich. 1.

Procedure on Acquittal. When a person accused of any felony is acquitted by reason of insanity, the court, "being certified by the jury or otherwise² of the fact," must carefully inquire and ascertain the issue of insanity. The court is required to call two or more reputable physicians and other credible witnesses, and may impanel a jury. If found insane, such person is committed to the state hospital

² The phrase "or otherwise" authorizes the court to act even when the jury omits to state that it acquits "by reason of insanity." The statute thereby avoids such decisions as that of *State v. Craig* (1918) 176 N.C. 740, 97 S.E. 400, where, the jury returning a verdict of "not guilty," the court asked whether the verdict was on the ground of insanity. The jury replied that it was, and thereupon the court ordered it so entered and proceeded to hold the defendant for examination, as provided by statute. The North Carolina Supreme Court held this error. The verdict of not guilty, once rendered, must be received, it was held, and cannot be set aside or materially altered, by ordering it entered as a verdict of not guilty by reason of insanity. Under the Michigan law (and also that of Alabama, New Jersey, and a few other states having similar statutes), the court could hold the defendant for commitment upon learning the ground for the verdict in such informal way.

until restored to sanity. Comp. Laws (1929), §17241, as amended, Public Acts, 1931, No. 317, p. 531.

Procedure for Release on Recovery. On recovery, the superintendent shall inform the judge and prosecuting attorney of the fact, so that the person may be remanded to prison, and there discharged. *Ibid.*

The question of recovery may also be raised on return of a writ of *habeas corpus*. If the court deems it necessary, it may call a jury for this purpose. *Ibid.*

MINNESOTA

Pleading. Insanity is a defense under a plea of not guilty.

Form of Verdict. When a defendant is acquitted on the ground that he was "insane, an idiot, or an imbecile" at the date of the offense, the jury or court, as the case may be, shall so state in the verdict or upon the minutes, and shall also state whether the defendant at the date of the offense "had homicidal tendencies." Stat. (1927), §10723, as amended, Laws, 1931, chap. 364.

Procedure on Acquittal. If defendant is found to have been insane at the time of the act, the court is required forthwith to commit him to the proper state hospital or asylum. If found to have had homicidal tendencies, he is committed to the hospital for the dangerous insane. *Ibid.*

Procedure for Release on Recovery. Such person shall be liberated "upon the order of the court committing him" whenever the superintendent of the hospital certifies to the court in writing that, in his opinion, he "is wholly recovered, and that no person will be endangered by his discharge."

If the superintendent fails or refuses to furnish such certificate, a petition may be addressed to the court, and the question decided by the court without regard to the superintendent's opinion. Stat. (1927), §10723, as amended, Laws, 1931, chap. 364, p. 469.

Habeas corpus is not available to persons "committed or detained by virtue of the final judgment of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment." Stat. (1927), §9739. An adjudication of insanity is a final

judgment, and in such cases the writ goes only to jurisdictional defects. State *ex rel. Degen v. Freeman* (1926) 168 Minn. 374, 210 N.W. 14.

MISSISSIPPI

Pleading. No special plea is provided for. Evidence of insanity may be introduced under the plea of not guilty.

Failure to Indict Because of Insanity. When the grand jury does not find a true bill by reason of the insanity of the accused, it shall certify the fact to the court, and shall state "whether such insane person be in such condition as to endanger the security of persons or property and the peace and safety of the community." If the grand jury reports such unsoundness and such danger, the court must forthwith notify the chancery court, whose duty it is to institute lunacy proceedings against the person. Code (1930), §1326.

Form of Verdict. If the jury acquits by reason of insanity, the verdict must state the ground of acquittal, whether the accused has since been restored to reason, and whether he is dangerous to the community. Code (1917), §1302 (this provision was not included in 1930 revision of the Code because impliedly repealed by Laws of 1928, chap. 75, attempting to abolish insanity as a defense to murder. But the act of 1928 was held unconstitutional in *Sinclair v. State* [1931] 161 Miss. 142, 132 So. 581).

Procedure on Acquittal. If the jury certify that he was insane at the time of the crime, and still is insane and dangerous, the judge shall order him confined in a state asylum. *Ibid.*

Procedure for Release on Recovery. There is no express provision for the discharge of defendants committed as insane upon acquittal by reason of insanity, and the court has never decided whether a person so committed is entitled to be released on recovery of his sanity. *Sinclair v. State* (1931) 161 Miss. 142, 132 So. 581, 595.

MISSOURI

Pleading. No special plea is provided for. Insanity is a defense under a plea of not guilty.

Form of Verdict. When a person is acquitted on the sole ground that he was insane at the time of the offense, the fact should be

found by the jury, and they should further find whether he has entirely and permanently recovered. Rev. Stat. (1929), §§3660, 8655.

Procedure on Acquittal. If the jury acquits on the sole ground of insanity, and finds that the prisoner has not entirely and permanently recovered, the court, if satisfied that "it would be unsafe to permit the prisoner to go at large," shall order him sent to a hospital for the insane.³ If the prisoner is a poor person, the commitment is made by the county court, as in the case of other poor and insane persons. Rev. Stat. (1929), §§8655-8657. See also §3660, which is similar.

Provision for Release on Recovery. Any patient in the hospital may be discharged by the superintendent "whenever, in his opinion, the reason of such person is fully restored." Rev. Stat. (1929), §8629. But persons who have committed homicide can be discharged only by the "consent of the superintendent and the written admission of a majority of the board of managers." Rev. Stat. (1929), §8661.

MONTANA

Pleading. Insanity is a defense under a plea of not guilty.

Form of Verdict. When a defendant is acquitted on the ground of insanity at the time of the act, the verdict must be "not guilty by reason of insanity." Rev. Codes (1921), §12020. The jury must be instructed accordingly. *State v. Crowe* (1909) 39 Mont. 174, 102 Pac. 579.

Procedure on Acquittal. On such verdict, the court "may" order a second jury summoned, to try whether the defendant continues to be insane. If he is found on this second trial still to be insane, he is

³ This discretion vested in the court to commit a defendant whom the jury has found insane at the time of the act and not recovered, if the court is satisfied that his discharge would be dangerous, harks back to the time, prior to 1883, when the jury found only as to the defendant's mental condition at the time of the act. By the Laws of 1883, p. 78, the jury was given the duty of determining also whether the defendant had recovered his sanity since the time of the act, but the section authorizing the judge to commit such a defendant "if satisfied" that his going at large would be dangerous, was left unchanged.

committed to a state asylum; if found sane, he is discharged. Rev. Codes (1921), §12036.

Procedure for Release on Recovery. There is no express provision for the discharge of such inmates. It seems they may be discharged like non-criminal inmates, by the asylum board, after examination. Rev. Codes (1921), §1421.

NEBRASKA

Pleading. A defendant "may plead that he is not guilty by reason of insanity or mental derangement. . . . Provided, the defense of insanity may be raised under a general plea of not guilty." Comp. Stat. (1929), §29-2204.

Form of Verdict. If the jury acquit on the ground of insanity, they must be instructed to state the fact in their verdict. *Ibid.*

Procedure on Acquittal. Upon such verdict the court "must order the defendant to be committed to the state hospital," until he becomes sane. *Ibid.*

Procedure for Release on Recovery. Persons committed upon acquittal by reason of insanity are kept in confinement until they become sane "and are discharged by due process of law." *Ibid.* This provision, it seems, entitles such inmates to be discharged like any other persons in the hospital, i.e., by the superintendent. Comp. Stat. (1929), §83-728.

All persons confined as insane are entitled to the benefit of a writ of *habeas corpus*. A decision that the person is still insane is no bar to the issuing of the writ a second time, whenever it is again alleged that the person has recovered. The board of insanity commissioners must be given reasonable notice. Comp. Stat. (1929), §83-726.

NEVADA

Pleading. Insanity is a defense under the plea of not guilty.

Form of Verdict. When a defendant is acquitted on the ground that he was insane at the time of the act, the verdict must be, "not guilty by reason of insanity." Comp. Laws (1929), §11014.

Procedure on Acquittal. Such verdict has "the same force and effect as if he were regularly adjudged insane," and the judge must

thereupon order the defendant confined in the hospital for mental diseases. Comp. Laws (1929), §11015.

Procedure for Release on Recovery. There is no express provision for the discharge of such persons. Section 11015 provides merely for confinement in the hospital "until he be regularly discharged therefrom in accordance with law."

NEW HAMPSHIRE

Pleading. A defendant "may plead that he is not guilty by reason of insanity or mental derangement." Public Laws (1926), chap. 369, §2.

Commitment for Observation. A defendant making this plea may be summarily ordered by the court to be confined in the state hospital for observation, "until further order of the court," or until discharged by the hospital authorities as not insane. Public Laws (1926), chap. 11, §13.

Form of Verdict. Whenever the grand jury omits to find an indictment, or a petit jury acquits a defendant of crime, for the reason of insanity or mental derangement, such jury "shall certify the same to the court." Public Laws (1926), chap. 369, §1.

Procedure on Acquittal or Failure to Indict. In either case, the court, if it believes it dangerous for such person to go at large, may commit him to prison, or to the state hospital. Public Laws (1926), chap. 369, §3.

Procedure for Release on Recovery. If committed to prison, such defendant may be discharged or transferred to the asylum by the governor and council, or the superior court, "whenever they are satisfied that such discharge or transfer will be conducive to the health and comfort of the person and the welfare of the public." Public Laws (1926), chap. 369, §4. Persons committed to the asylum may be discharged by the commission of lunacy, or by a justice of the superior court, "whenever a further detention at the asylum is, in their opinion, unnecessary." Public Laws (1926), chap. 11, §26.

The superior court or any justice thereof may also, on application, investigate "whether there is sufficient reason for the detention in said hospital of any person who has been committed thereto," and may

order a discharge, without the formality of a writ. Public Laws (1926), chap. 11, §28.

NEW JERSEY

Pleading. Insanity is a defense under the plea of not guilty.

Form of Verdict. There is no express requirement that the jury, acquitting a defendant on the ground of insanity, must state the fact in their verdict.

Procedure on Acquittal or Failure to Indict. However, when a person escapes indictment or is acquitted upon the ground of insanity, the court, "being certified by the jury or otherwise of the fact," shall "carefully inquire" and ascertain whether the insanity in any degree continues; if so, it shall order him into safe custody, and to be sent to a state hospital. Laws, 1922, chap. 101, §3; Comp. Stat. (Cum. Supp., 1911-1924), §53-133p.

Procedure for Release on Recovery. A defendant so committed "shall not be released from confinement except upon the order of the trial justice or judge having jurisdiction to try such person." *Ibid.* But this does not prevent the use of the writ of *habeas corpus*. *Ibid.* On the return of the writ, the insane person and the medical director of the hospital are entitled to appear and be heard, and the court in its discretion may call a jury. Comp. Stat. (Cum. Supp., 1911-1924), §§88-31a to 88-31d.

NEW MEXICO

Pleading. Insanity is a defense under the plea of not guilty.

Form of Verdict. Whenever it appears on the trial that defendant was insane at the time of the act, and he is acquitted, the jury must find specially, whether such person was insane at the time of the act, and whether he was acquitted on that ground. Stat. (1929), §§105-2227.

Procedure on Acquittal. If the jury so find and declare, the court has power to order the defendant kept in strict custody, "in such place and in such manner as to the said court shall seem fit," so long as he continues to be of unsound mind. *Ibid.*

Procedure for Release on Recovery. Every month, the superintendent must cause all persons in the asylum to be examined as to their

thereupon order the defendant confined in the hospital for mental diseases. Comp. Laws (1929), §11015.

Procedure for Release on Recovery. There is no express provision for the discharge of such persons. Section 11015 provides merely for confinement in the hospital "until he be regularly discharged therefrom in accordance with law."

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Pleading. A defendant "may plead that he is not guilty by reason of insanity or mental derangement." Public Laws (1926), chap. 369, §2.

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NEW JERSEY

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Form of Verdict. There is no express requirement that the jury, acquitting a defendant on the ground of insanity, must state the fact in their verdict.

Procedure on Acquittal or Failure to Indict. However, when a person escapes indictment or is acquitted upon the ground of insanity, the court, "being certified by the jury or otherwise of the fact," shall "carefully inquire" and ascertain whether the insanity in any degree continues; if so, it shall order him into safe custody, and to be sent to a state hospital. Laws, 1922, chap. 101, §3; Comp. Stat. (Cum. Supp., 1911-1924), §53-133p.

Procedure for Release on Recovery. A defendant so committed "shall not be released from confinement except upon the order of the trial justice or judge having jurisdiction to try such person." *Ibid.* But this does not prevent the use of the writ of *habeas corpus*. *Ibid.* On the return of the writ, the insane person and the medical director of the hospital are entitled to appear and be heard, and the court in its discretion may call a jury. Comp. Stat. (Cum. Supp., 1911-1924), §§88-31a to 1

NEW MEXICO

Pleading. Insanity is a defense under the plea of not guilty.

Form of Verdict. Whenever it appears on the trial that defendant was insane at the time of the act, and he is acquitted, the jury must find specially, whether such person was insane at the time of the act, and whether he was acquitted on that ground. Stat. (1929), §§105-2227.

Procedure on Acquittal. If the jury so find and declare, the court has power to order the defendant kept in strict custody, "in such place and in such manner as to the said court shall seem fit," so long as he continues to be of unsound mind. *Ibid.*

Procedure for Release on Recovery. Every month, the superintendent must cause all persons in the asylum to be examined as to their

sanity, and the names of those found sane must be certified to the district judge of the county from which they were committed, and the said judge thereupon enters an order of discharge. Stat. (1929), §130-806.

NEW YORK

Pleading. Defendant may present a plea of insanity "as a specification under the plea of not guilty." Code of Crim. Proc., §336. However, such specification need not be made; the defense of insanity is always open for trial under the plea of not guilty. *Ostrander v. People* (1882) 28 Hun 38; *People v. McElvaine* (1891) 125 N.Y. 596, 26 N.E. 929; *People v. Joyce* (1922) 233 N.Y. 61, 134 N.E. 836.

Examination by Commission. When a defendant pleads insanity, the court, instead of proceeding with the trial, may appoint a commission of not more than three "disinterested persons," to examine him, and report as to his sanity at the time of the act charged. The commission may call and examine witnesses, and counsel and the prosecuting attorney may appear. If the commission finds the defendant insane, the trial must be suspended until he becomes sane, and if the court deems his discharge dangerous to the public peace or safety, it may order that he be meanwhile confined in a lunatic asylum. Code of Crim. Proc., §§658, 659. In any criminal action or *habeas corpus* proceeding, in which the soundness of mind of a person is in issue, the court may appoint not more than three competent physicians to examine the person, and to testify as witnesses. Consol. Laws (Cahill, 1930), chap. 31, §31.

Form of Verdict. When the defense is insanity, the jury must be instructed, if they acquit on that ground, to state the fact with their verdict. Code of Crim. Proc., §454.

Procedure on Acquittal. Thereupon, if the defendant is in custody, and if the court deems his discharge dangerous to the public peace or safety, it must order him committed to the lunatic asylum, until he becomes sane. *Ibid.* This provision is constitutional. *People ex rel. Peabody v. Baker* (1908) 59 Misc. 359, 110 N.Y. Supp. 848; *People ex rel. Peabody v. Chanler* (1909) 133 App. Div. 159, aff'd, 196 N.Y.

New York is perhaps the only state which provides for the situation where a person insane at the time of the act charged is nevertheless convicted. If the prison warden has reason to believe that any prisoner was insane at the time of the act for which he was sentenced, he shall communicate his opinion to the commissioner of correction, who shall communicate with the governor, and recommend what should be done. Consol. Laws (Cahill, 1930), chap. 10-b, §133.

Procedure for Release on Recovery. A patient held upon order of a court or judge having criminal jurisdiction may be discharged upon the superintendent's certificate of recovery, approved by such court or judge. Consol. Laws (Cahill, 1930), chap. 36-a, §85.

Habeas corpus is also available, but its use is regulated by statute. On the return of the writ, the patient's medical or other history must be given in evidence, the medical officer of the institution must be sworn, and evidence received upon any prior hearing or trial may be received. The petition must state what other writs have been granted; and the determination thereon. Consol. Laws (Cahill, 1930), chap. 36-a, §204. The court, in its discretion, may try the issue to a jury. *People v. Hendrick* (1915) 215 N.Y. 339, 109 N.E. 486. The burden of proof is on the applicant, to prove to a "reasonable certainty," that the patient has so far recovered that his discharge will not endanger public peace or safety. *People ex rel. Peabody v. Chanler, supra*; *People ex rel. Thaw v. Lamb* (1909) 118 N.Y. Supp. 389.

NORTH CAROLINA

Pleading. There is no special plea. *State v. Potts* (1888) 100 N.C. 457, 6 S.E. 657. Insanity is a defense under the plea of not guilty.

Form of Verdict. There is no specific requirement that a jury acquitting because of insanity must state the fact.

Procedure on Acquittal or Failure to Indict. When a person accused of murder, attempt at murder, rape, assault with intent to commit rape, highway robbery, train wrecking, arson, "or other crime" escapes indictment, or is acquitted on the ground of insanity, the court "shall detain such person in custody until an inquisition shall be had in regard to his mental condition." If the judge finds

the defendant dangerous to himself or to others, and that his confinement is necessary, he shall order him confined for treatment and care. Code (1931), §6237.

The reference in this section to "other crimes" has been construed to mean "other crimes of like kind and grade," and not to include misdemeanors. *State v. Craig* (1918) 176 N.C. 740, 97 S.E. 400. There is no statutory provision for the confinement of persons acquitted of misdemeanors by reason of insanity. If it is disclosed on the trial that such a person was so far deranged as to threaten the safety of his family or neighbors, the magistrate can order his restraint, that proper steps may be taken for his commitment and care. *State v. Craig, supra (dictum)*.

Procedure for Release on Recovery. A person acquitted of a capital felony can be discharged from confinement only by act of the General Assembly. Defendants committed upon acquittal of lesser offenses can be discharged by order of the governor. However, the right to apply for writ of *habeas corpus* is expressly preserved by statute. Code (1931), §6239. But "no judge issuing a writ of *habeas corpus* . . . shall order his discharge until the superintendents of the several state hospitals shall certify that they have examined such person and find him to be sane, and that his detention is no longer necessary for his own safety or the safety of the public." *Ibid*.

NORTH DAKOTA

Pleading. Insanity is a defense under the plea of not guilty.

Form of Verdict. If the defense is insanity, the jury must be instructed, if they acquit on that ground, to state the fact with their verdict. Comp. Laws (1913), §10901.

Procedure on Acquittal. Thereupon, if the defendant is in custody, and the court deems his discharge dangerous to the public peace or safety, it may order him committed to the care of the sheriff until he becomes sane. *Ibid*. Another measure provides that the court may order such person committed to the state hospital for the insane, or to the care of such person or persons as the court may direct till he becomes sane. Comp. Laws (1913), §9210.

Procedure for Release on Recovery. There is no express provision

for the discharge of patients so confined. It seems such defendants are entitled to discharge like other patients, i.e., by the county judge, after examination by a commission appointed by such judge on application. Comp. Laws (1913), §2562.

"All persons confined as insane" are also guaranteed the right to *habeas corpus*. Comp. Laws (1913), §2564.

OHIO

Pleading. A special plea, "Not guilty by reason of insanity," is required. A defendant who does not enter such plea is conclusively presumed to have been sane at the time of the act charged, but the court, "for good cause shown," may allow a change of plea at any time before commencement of the trial. Ann. Code (1930), §13440-2.

Commitment for Observation. In any case in which it is alleged that the defendant is irresponsible because of insanity at the time of the act, or that he is presently too insane to be tried, the court may commit him to an insane hospital for observation for a period not exceeding one month. And the court may appoint not more than three specialists in mental diseases, to examine the defendant and testify at the trial, as court's witnesses. Such experts may be required by the court to prepare a written statement under oath, and file the same in the case, but it may not be read in evidence, except that counsel may use it on cross-examination. Ann. Code (1930), §13441-4.

Form of Verdict. When a defendant is acquitted on the sole ground of insanity, "such fact shall be found by the jury in its verdict." Ann. Code (1930), §13441-3.

Procedure on Acquittal. On such verdict, "it shall be presumed that such insanity continues," and the court shall forthwith direct that the accused be confined in the state hospital. *Ibid.*

Procedure for Release on Recovery. "Such person shall not be released from confinement in such hospital unless and until the judge of the court of common pleas of Allen County, Ohio, the superintendent of said Lima State Hospital and an alienist to be designated by said judge and said superintendent, or a majority of them, after notice and hearing, find and determine that said defendant's sanity has been restored and that his release will not be dangerous." The

defendant may be given a final or a conditional release, or may be paroled. "Nothing in this section shall be held or construed to deprive such person of his constitutional privilege to the writ of *habeas corpus*." *Ibid*. The jurisdiction of the court in *habeas corpus* cannot be denied or circumvented by legislation, "although legislation may provide for reasonable facilities for its judicial exercise." *Ex parte Remus* (1928) 119 Ohio 166, 162 N.E. 740. Upon *habeas corpus* proceedings, the inmate has the burden of proving his sanity with reasonable certainty, the presumption being that the insanity found by the verdict in the criminal trial continues to exist. *Ibid*.

OKLAHOMA

Pleading. Insanity is a defense under the plea of not guilty.

Form of Verdict. When the jury acquits on the ground of insanity at the time of the act charged, the verdict must be "not guilty by reason of insanity." Stat. (1931), §3095.

Procedure on Acquittal. It seems that upon such verdict, the court is required forthwith to order the defendant into confinement, although the statute is remarkably ambiguous. Stat. (1931), §3106.⁴

Procedure for Release on Recovery. There seem to be several provisions applicable. The medical superintendent of the hospital has power to discharge any patient whom he considers recovered or whose discharge would not be "injurious to the public or to the patient." Stat. (1931), §§5021, 5023. Application for discharge may also be made to the county judge, who is required to appoint a commission to examine the person, before determining the question. Stat. (1931), §5065. Such application can be made only at intervals of six months. Stat. (1931), §5066. Another section provides that insane persons are not to be discharged from the insane hospital "unless it be upon the recommendation of the superintendent." Stat. (1931), §5091.

Habeas corpus is also available. On the return of the writ, the medical history of the patient must be given in evidence, and the medical superintendent sworn. Stat. (1931), §§5067, 5024. A person is not en-

⁴ The section purports to refer to the situation where it is contended that the defendant is "at the time of the trial" insane; yet it requires the jury to find the defendant not guilty on account of such insanity.

titled to a jury trial on *habeas corpus* proceedings, and if a jury is granted, the court is not bound by its findings. *Ex parte* Gonshor (1926) 114 Okla. 143, 244 Pac. 787.

OREGON

Pleading. Insanity is a defense under the plea of not guilty. "A plea of insanity is inadmissible." *State v. Branton* (1899) 33 Ore. 533, 550, 56 Pac. 267.

Form of Verdict. When the defense is insanity, the jury must be instructed that if they acquit for that reason, they must state the fact in their verdict. Code (1930), §13-953.

Procedure on Acquittal. When the jury acquits because of insanity, the court, "if it deems his being at large dangerous to the public peace or safety," must order him committed to a lunatic asylum until he become sane, or otherwise discharged. *Ibid.* The court need not instruct the jury that such commitment will follow if they return a verdict of not guilty by reason of insanity, this being a matter for the court alone, and not for the jury. *State v. Daley* (1909) 54 Ore. 514, 103 Pac. 502, 104 Pac. 1 (King, J., dissenting).

Procedure for Release on Recovery. There is no express provision for the discharge of defendants committed on such acquittal. On the contrary, the superintendents of the state hospitals are given power to discharge "any patient, *except* one held upon an order of a court or judge having criminal jurisdiction in an action or proceeding arising out of a criminal offense." Code (1930), §§67-1601, 67-1602.

PENNSYLVANIA

Pleading. Insanity is a defense under the plea of not guilty. *Taylor v. Comm.* (1885) 109 Pa. 262.

Form of Verdict. When evidence of insanity at the time of the act is introduced on the trial, and the defendant is acquitted, the jury is required to find specially whether he was insane at the time of the offense, and to declare whether he was acquitted on that ground. Stat. (1920), §14445, as amended, Laws, 1929, No. 235, p. 532; Laws, 1923, No. 414, §308, p. 1007.

Procedure on Acquittal. On such verdict, the court has power to

order the defendant kept in "strict custody, in such place and in such manner as to the said court shall seem fit." Stat. (1920), §14445, as amended, Laws, 1929, No. 235, p. 532. The Mental Health Act provides that on such verdict, the court may order the defendant committed to a hospital for mental diseases, and may appoint a commission to inquire into his sanity and report to the court. Laws, 1923, No. 414, §308, p. 1007. The court also has power to parole a defendant acquitted by reason of insanity. *Comm. v. Baginski* (1925) 85 Pa. Super. Ct. 47.

Procedure for Release on Recovery. Such defendant is dischargeable only by the court that committed him. Laws, 1923, No. 414, §404, p. 1013. The court also has power to deliver such person into the custody of friends or the supervisors or overseers of the county, on satisfactory security, and with condition to restrain him from committing any offense. Stat. (1920), §14448. Or the court may release him on parole. Stat. (1920), §§14456-14458.

Any person is entitled to a writ of *habeas corpus*, on a sworn statement that a person in confinement is not insane. The burden of proving insanity on such hearing is on those restraining him of his liberty. Stat. (1920), §14294.

RHODE ISLAND

Pleading. "The statute is silent as to how this defense shall be set up, and so it need not be presented in writing but may be advanced verbally by counsel as the plea of not guilty is by the accused, or by the court on his behalf, if he stands mute when arraigned." *State v. Quigley* (1904) 26 R.I. 263, 276, 58 Atl. 905.

Form of Verdict. The jury, if they acquit on the ground of insanity, shall state that they have so acquitted him. Gen. Laws (1923), §1604.

Procedure on Acquittal. On such verdict, if the going at large of the defendant is deemed by the court dangerous to the public peace, it shall certify that opinion to the governor, who thereupon may make provision for removing such defendant to the prison insane ward, the state hospital for mental diseases, or other institution for the insane. *Ibid.*

Procedure for Release on Recovery. "Any person confined in such

institution for the insane" may petition a justice of the supreme court for release, or any person may petition in his behalf. On such petition, the justice is required to appoint not less than three commissioners to inquire into the person's condition. On the basis of the commission's report, after an inquisition, the justice may either discharge or recommit the person. Gen. Laws (1923), §§1597-1600. The agent of the state charities and corrections and the chairman of the state board of health are also given power as a commission to examine any inmate of any insane asylum, and petition a justice of the supreme court to have an examination made as provided above. Gen. Laws (1923), §1611.

The procedure just outlined "shall not impair or abridge the right of any person to the writ of *habeas corpus*." Gen. Laws (1923), §1601. If the court deems it necessary or proper, issues may be framed and submitted to a jury. If the person is found "not insane, or that he is not dangerous to himself or others and ought not longer to be so confined," he shall be discharged. *Ibid.* A jury trial under this section is not a matter of right, where nothing in the facts makes it "necessary or proper" to direct an issue to a jury. Palmer, Petitioner (1904) 26 R.I. 222, 58 Atl. 660. The burden of proving that he is sane and that his going at large will not be dangerous is on the petitioner. *Ibid.*

SOUTH CAROLINA

Pleading. Insanity is a defense under the plea of not guilty. State *v.* Lemacks (1914) 98 S.C. 498, 82 S.E. 879.

Procedure on Acquittal. The only statutory provision on the subject is peculiarly vague. It provides that the judge may commit any person charged with crime who, upon the trial, is "adjudged insane," or "in whom there is a question as to the relation of mental disease to the alleged crime," whether this appears to the judge from the evidence or "upon his own recognition." The commitment is for thirty days only, at the end of which time the person must be returned if found sane, or duly committed if insane. Code of Laws (1932), §6239. It is not clear whether the act is meant to apply to the defense of insanity at the time of the act, or insanity at the time of the trial, or both.

The South Carolina court has declared the practice to be that if the jury declare a defendant insane, "the judge passes an order committing him to the hospital for the insane, and that ends the charge." *State v. Chandler* (1923) 126 S.C. 149, 119 S.E. 774.

Procedure for Release on Recovery. There is no provision for the discharge of persons committed upon an acquittal by reason of insanity.

SOUTH DAKOTA

Pleading. Insanity is a defense under the plea of not guilty.

Form of Verdict. If the defense involves insanity the jury must be instructed, if they acquit on that ground, to state the fact in their verdict. Comp. Laws (1929), §§4918, 4935.

Procedure on Acquittal. On such verdict, the court, if the defendant is in custody and it deems his discharge dangerous to public peace or safety, may order him committed to an insane hospital until he becomes sane. *Ibid.* Another section provides that the court may order him to an insane hospital, "or to the care of such person or persons as the court may direct." Comp. Laws (1929), §3586.

Procedure for Release on Recovery. There is no special provision for the discharge of persons committed upon acquittal of crime by reason of insanity. It seems such inmates are discharged like non-criminal patients, i.e., by the judge, after examination and report by a commission appointed by the court. Comp. Laws (1929), §§10084, 10085.

"All persons confined as insane" are entitled to the benefit of the writ of *habeas corpus*. A finding at the hearing that the person is still insane is no bar to the issuing of the writ a second time, whenever it is alleged that the person has been restored to sanity. Comp. Laws (1929), §10086.

TENNESSEE

Pleading. Insanity is a defense under the plea of not guilty. *Dove v. State* (1872) 50 Tenn. 348, 374.

Form of Verdict. No special form of verdict is required by statute.

Procedure on Acquittal. There is no provision for committing a defendant acquitted by reason of insanity. It seems that a defendant

so acquitted is entitled to an absolute discharge and to go at liberty. *Dove v. State*, *supra*. It may be, however, that upon such acquittal lunacy proceedings may be started, as in civil cases.

Procedure for Release on Recovery. No provisions.

TEXAS

Pleading. Insanity is a defense under a plea of not guilty. *King v. State* (1880) 9 Tex. App. 515, 544.

Form of Verdict. When the defendant is acquitted on the ground of insanity, the jury shall so state in their verdict. Complete Stat. (1928), Code of Crim. Proc., art. 700.

Procedure on Acquittal. The statute makes no provision, however, for the procedure to be followed on the return of such a verdict. In practice, it seems that a defendant acquitted of crime by reason of insanity may have a complaint filed against him, and the issue of his mental condition is then tried to a jury.⁵ Unless such complaint is filed, however, it seems the defendant is entitled to an absolute discharge.

Procedure for Release on Recovery. Persons judicially adjudged insane may, it seems, be discharged by the superintendent. Complete Stat. (1928), vol. i, art. 3193i.

UTAH

Pleading. Insanity is a defense under the plea of not guilty.

Form of Verdict. When the defendant is acquitted on the ground of insanity at the time of the act, the verdict must be, "not guilty by reason of insanity." Comp. Laws (1917), §9023.

Procedure on Acquittal or Failure to Indict. Whenever a person charged with crime escapes information or indictment, or is acquitted, on the ground of insanity (or whenever during the course of the criminal proceedings the defendant becomes insane), "complaint under oath must be made," setting forth the facts, and the question "may be submitted to a jury." If the jury find the defendant insane, the

⁵ Information to the writer from Mr. R. D. Cox, Jr., Assistant Attorney General of Texas.

judge shall order him conveyed to the state mental hospital, "provided the court deems his freedom a menace to public quietude." If found sane, he must be discharged. Comp. Laws (1917), §§9328-9332.

Procedure for Release on Recovery. A defendant committed to the asylum on such proceedings is to be detained there "until he becomes sane." The determination of his recovery seems to be left to the superintendent. Comp. Laws (1917), §9334.

VERMONT

Failure to Indict Because of Insanity. When a defendant is not indicted by the grand jury by reason of insanity, the grand jury shall so certify to the court, whereupon, "if the discharge or going at large of said insane person is considered dangerous to the community," the court may order him confined in the county jail, the state insane hospital, or some other suitable place. Gen. Laws (1917), §2603.

Pleading. Insanity is a defense under the plea of not guilty.

Commitment for Observation. When a plea of insanity is made, or if the judge is satisfied it will be made, he may order the defendant into the care of the superintendent of the state hospital, for observation until further order of the court, "that the truth or falsity of such plea may be ascertained." Gen. Laws (1917), §2602. The superintendent may testify at the trial to his opinion of the mental condition of the defendant, based upon his observations. *State v. Eastwood* (1901) 73 Vt. 205, 50 Atl. 1077.

Form of Verdict. When the jury acquits by reason of insanity, it shall state in its verdict that it is given for such cause. Gen. Laws (1917), §2604.

Procedure on Acquittal. On such verdict, "if the discharge or going at large of said insane person is considered dangerous to the community," the court in its discretion may order him confined in the state prison, the state hospital for criminal insane, or some other suitable place, "on such terms as the court directs." *Ibid.* If the court, in the exercise of this discretion, orders him confined in the prison, the superintendent there may subject him to such labor and discipline "as his condition and circumstances require." Gen. Laws (1917), §7220.

Procedure for Release on Recovery. Persons confined under the

provisions above may be discharged "only by order of the county court for the county in which the order for confinement was made," upon petition, which must be served upon the state's attorney. Gen. Laws (1917), §2605. If, upon the hearing, it appears that the person has become sane, and the court considers his release or going at large not dangerous to the community, it shall order his discharge; otherwise it shall order him recommitted. Gen. Laws (1917), §2609.

This provision, the act states, "shall not affect the right of a person so confined to sue out a writ of *habeas corpus*." Gen. Laws (1917), §2605.

VIRGINIA

Pleading. Insanity at the time of the act may be raised as a defense under a plea of not guilty. *Baccigalupo v. Comm.* (1880) 33 Grat. 807; *Stover v. Comm.* (1895) 92 Va. 780, 22 S.E. 874. Or it may be determined by a special jury, when the question of present insanity at the time of trial is in issue. Code (1930), §4909.⁶

Form of Verdict. When the defense is insanity or feeble-mindedness at the time of the offense, the jury shall be instructed, if they acquit on that ground, to state the fact with their verdict. Code (1930), §4913.

Procedure on Acquittal. Thereupon, the court, "if it deem his discharge dangerous to the public peace or safety," shall order him committed to a state insane hospital, "under special observation and custody."⁷ *Ibid.*

Procedure for Release on Recovery. Such person is to be so confined

⁶ Under this section if the special jury find that the defendant is insane at the time of the trial, they must further find whether or not he was sane at the time of the act charged. If they find he was insane at the time of the act, the court may dismiss the prosecution and order the defendant committed to an insane hospital, until he becomes sane.

⁷ It is possible that under Acts 1920, chap. 339, p. 510, the defendant, after a verdict of acquittal by reason of insanity, may demand a jury trial of the issue of his present mental condition, before the court can commit him. That act amended a number of sections of the Code dealing with insanity in criminal trials. Under one of the sections amended (1045) was included this proviso: "provided, however, that no person shall, *in any case enumerated in this act*, be denied the right of a trial by jury as to his sanity or mentality, if he or she shall so elect." Another section amended

"until the superintendent of that hospital and the superintendent of any other State hospital or feeble-minded colony shall pronounce him sane and safe to be at large." *Ibid.*

"Any person held in custody as insane, epileptic, feeble-minded or inebriate," may have the legality of his detention and his present condition determined upon writ of *habeas corpus*. Code (1930), §1029.

WASHINGTON

Pleading. The defense of "insanity or mental irresponsibility" is pleaded specially by written plea setting up "(1) his insanity or mental irresponsibility at the time of the commission of the crime charged, and (2) whether the insanity or mental irresponsibility still exists, and (3) whether the defendant has become sane or mentally responsible between the time of the commission of the crime and the time of the trial." Comp. Stat. (Remington, 1922), §2174. In the absence of such plea, evidence of insanity will not avail the defendant. *State v. Gounagias* (1915) 88 Wash. 304, 321, 153 Pac. 9.

Form of Verdict. When this plea is interposed, the jury is to be instructed that if they acquit, they should return a special verdict, finding "(1) whether the defendant committed the crime and if so, (2) whether they acquit him because of his insanity or mental irresponsibility at the time of its commission, (3) whether the insanity or mental irresponsibility continues and exists at the time of the trial, and (4) whether, if such condition of insanity or mental irresponsibility does not exist at the time of the trial, there is such a likelihood of a relapse or recurrence of the insane or mentally irresponsible condition, that the defendant is not a safe person to be at large." Comp. Stat. (Remington, 1922), §2175.

Procedure on Acquittal. If the defendant is found to have been insane at the time of the act, but since recovered and not liable to a relapse, and a safe person to be at large, he is discharged. If he is found still to be insane, or that though recovered, so liable to a relapse as to be unsafe to be at large, the court must order him com-

and re-enacted in this act was section 4913, above. What effect has the proviso, purporting to apply to "any case enumerated in this act," on section 4913?

mitted as a criminally insane person. Comp. Stat. (Remington, 1922), §2176. Such persons are confined in the ward for the criminal insane at the state penitentiary. *Ibid.*, §6973. This automatic commitment on such verdict does not violate due process. *State v. Saffron* (1927) 146 Wash. 202, 262 Pac. 970.

Procedure for Release on Recovery. When a person so committed claims to have become sane, he may apply to the physician in charge of the criminal insane for examination. If the physician shall certify to the warden that he has become sane since his commitment, and is safe to be at large, the warden shall permit him to petition the court that committed him, setting up that he has become sane. The petition must be served upon the prosecuting attorney, "whose duty it shall be to resist the application." The issue is tried before a jury. Comp. Stat. (Remington, 1922), §6970.

Under this statute, the physician must certify that the defendant has become sane since commitment, and a certificate that he is "at the present time sane" is not sufficient. *State v. Garrison* (1926) 137 Wash. 577, 243 Pac. 373.

This provision is not unconstitutional in giving an arbitrary power to the physician in charge. *State v. Saffron* (1927) 146 Wash. 202, 262 Pac. 970.

The remedy of *habeas corpus* does not seem to be available unless the person first applies for the certificate as provided by the statute. *State ex rel. Thomson v. Clifford* (1919) 106 Wash. 16, 179 Pac. 90.

Recommitment after Discharge. If a person so discharged again becomes insane or mentally irresponsible, or is found unsafe to be at large, the prosecuting attorney may file a petition setting up the facts, whereupon the person shall be taken into custody and tried before a jury, as to his sanity. The burden in this proceeding is upon the state to prove that he has again become unsafe to be at large by reason of mental unsoundness. Comp. Stat. (Remington, 1922), §6971.

WEST VIRGINIA

Failure to Indict Because of Insanity. When a person is not indicted "by reason of his insanity at the time of committing the act," the grand jury shall certify the fact to the court, whereupon the court

WYOMING

Pleading. Insanity is a defense under the plea of not guilty.

Form of Verdict. No special form of verdict is required by statute, in the event the jury acquits on the ground of insanity.

Procedure on Acquittal. Nor is there any statutory provision for the procedure to be followed in the event the jury does acquit a defendant on this ground. It seems that such a defendant is entitled to a general acquittal (letter to the writer from Mr. William O. Wilson, Attorney General of Wyoming).

CHAPTER VII

PRESENT INSANITY AT TIME OF CRIMINAL PROCEEDINGS

§1. GENERAL RULES

MENTAL unsoundness in a person accused of crime may give rise to two entirely distinct legal problems. The first is the question of the defendant's responsibility: whether, at the time of the act charged, he was so mentally disordered as not to be punishable for it, under the legal test of responsibility; that is, whether at that time he knew the wrongfulness of the act, and, in some states, whether he was able to resist the impulse to commit it. This is the problem we have dealt with in the preceding chapters. The other involves the defendant's mental condition not at the time of the act charged, but at the time of the criminal proceedings—whether he is presently sane enough to plead or be tried, or after trial, whether he is sane enough to receive sentence, or after sentence, whether he is sane enough to undergo punishment. Since the first problem involves the "guilt" or "innocence" of the defendant, while the second does not, the latter has been given but comparatively little consideration. Nevertheless, as a matter of procedure, it is highly important. Any reform in the method of trying persons alleged to be insane probably will come through perfecting means for preventing the trial of mentally diseased and defective persons, rather than through a change in the substantive law or procedure relating to the question of responsibility.

Common-Law Rule. It has long been the rule of the common law that a person cannot be required to plead to an indictment or be tried for a crime while he is so mentally disordered as to be incapable of making a rational defense, and he cannot be adjudged to punishment or executed while he is so disordered as to be incapable of stating any reasons that may exist why

judgment should not be pronounced or executed. If the court, at any of these stages, has a reasonable doubt whether the defendant is so mentally disordered, it should suspend the criminal proceedings and hold an inquiry on the matter, with or without a jury, and if the defendant be found to be so disordered, the court should postpone the criminal proceedings until he recovers his sanity, and order him to be in the meantime confined as an insane person.¹

The reasons usually given why such mental disorder is held to require the suspension of criminal proceedings against the person have been summarized as follows: "It would be inhuman, and to a certain extent a denial of the right of trial upon the merits, to require one who has been disabled by the act of God from intelligently making his defense to plead or be tried for his life or liberty. There may be circumstances in all cases of which the defendant alone has knowledge, which may prove his innocence, the advantage of which, if insane to such an extent that he did not appreciate the value of such facts, or the propriety of communicating them to his counsel, he would be deprived."² The same has been said by common law writers since

¹ 3 Coke Inst. 4; 4 Bl. Comm. 24, 395; *Bateman's Case* (1685) 11 How. St. Tr. 467, 476; *Frith's Case* (1790) 22 How. St. Tr. 307; *Nobles v. Georgia* (1897) 168 U.S. 398, 18 Sup. Ct. 87, 42 L. Ed. 515; *Youtsey v. U.S.* (1899) 97 Fed. 937; *People v. Gavrilovich* (1914) 265 Ill. 11, 106 N.E. 521; *Barrett v. Comm.* (1923) 202 Ky. 153, 259 S.W. 25; *Price v. State* (1930) 159 Md. 491, 151 Atl. 409; *Comm. v. Braley* (1804) 1 Mass. 103; *Hawie v. State* (1919) 121 Miss. 197, 83 So. 158; *Hawie v. State* (1921) 125 Miss. 589, 596, 88 So. 167; *Hawie v. Hawie* (1922) 128 Miss. 473, 91 So. 131; *Dunaway v. State* (1930) 157 Miss. 615, 128 So. 770; *Sinclair v. State* (1931) 161 Miss. 142, 132 So. 581; *State v. Peacock* (1887) 50 N.J.L. 34, 11 Atl. 270; *In re Smith* (1918) 25 N. Mex. 48, 176 Pac. 819; *Freeman v. People* (1847) 4 Denio (N.Y.) 9; *Bonds v. State* (1827) 8 Tenn. (Mart. & Y.) 143; *State v. Bethune* (1911) 88 S.C. 401, 408, 71 S.E. 29; *State v. Schrader* (1925) 135 Wash. 650, 238 Pac. 617; 38 L.R.A. 577, note.

² *Jordan v. State* (1910) 124 Tenn. 81, 135 S.W. 327, 34 L.R.A. (N.S.) 1115. Accord: *People v. Maynard* (1932) 347 Ill. 422, 179 N.E. 833.

the time of Coke.³ After sentence of death, an additional reason for suspending execution, besides the fact that the person, if sane, might have said something to show why execution should not be had, is the fact that the execution of an insane person can be no example to others, but, instead, would be a "miserable spectacle of extreme inhumanity and cruelty."⁴

Test of Present Insanity. Mental disorder in this sense, it can be seen, has no legal connection with the question of the defendant's responsibility or irresponsibility at the time of the offense. The tests of responsibility—capacity to know right from wrong, irresistible impulse, etc.—have no application here.⁵ The test of mental unsoundness which will operate to prevent a person's trial, sentence, or execution, while varying somewhat in the wording used in different cases, in general is: Has the defendant capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense?

³ 3 Coke Inst. 6; 1 Hale P.C. 35; 4 Bl. Comm. 24, 395.

⁴ Coke, *loc. cit.* The same reasoning seems equally applicable to punishment by imprisonment, but it is held that where the punishment is less than death, the fact that the defendant is insane is no ground for preventing such punishment from being carried out. *Kelley v. State* (1923) 157 Ark. 48, 247 S.W. 381; *Davidson v. Comm.* (1916) 171 Ky. 488, 188 S.W. 631. In capital cases, the objection that the defendant is insane must be heard and determined promptly, before sentence is executed, if he is to have the benefit of the rule that a person is not to be punished while insane. But where the punishment is not capital, there is no such need for haste; if the person is in fact insane, that fact can be brought to the attention of the prison authorities, and under statutes existing in almost all states, the prison authorities may transfer insane convicts to insane institutions.

⁵ *People v. Geary* (1921) 298 Ill. 236, 131 N.E. 652; *State v. Genna* (1927) 163 La. 701, 112 So. 655; *Jordan v. State* (1910) 124 Tenn. 81, 135 S.W. 327, 34 L.R.A. (N.S.) 1115. In some cases, judges have failed to distinguish between the test of responsibility, and the test of present insanity sufficient to prevent trial. *State v. Kalb* (1894) 7 Ohio N.P. 547; *State v. Tyler* (1898) 7 Ohio N.P. 443.

This has been adopted as the correct test to determine not only whether the person should be put on trial,⁶ but also after trial to determine whether sentence should be pronounced,⁷ or execution carried out.⁸

The rule is not uncommonly stated to be that if a person be-

⁶ This is the test laid down in the early American case of *Freeman v. People* (1847) 4 Denio (N.Y.) 9. It has been adopted in numerous later cases: *In re Buchanan* (1900) 129 Cal. 330, 61 Pac. 1120, 50 L.R.A. 378; *People v. Geary* (1921) 298 Ill. 236, 131 N.E. 652; *State v. Seminary* (1928) 165 La. 67, 115 So. 370; *Jordan v. State* (1910) 124 Tenn. 81, 153 S.W. 327, 34 L.R.A. (N.S.) 1115. A number of other forms of wording the test are also common. Perhaps the simplest is "capacity to make a rational defense," and is the form found in many cases: *Youtsey v. U.S.* (1899) 97 Fed. 937; *People v. West* (1914) 25 Cal. App. 369, 143 Pac. 793; *People v. Maynard* (1932) 347 Ill. 422, 179 N.E. 833; *Comm. v. Woelfel* (1905) 121 Ky. 48, 88 S.W. 1061; *State v. Genna, supra*; *Hawie v. State* (1921) 125 Miss. 589, 88 So. 167; *Marshall v. Terr.* (1909) 2 Okla. Crim. 136, 101 Pac. 139; *Guagando v. State* (1874) 41 Tex. 626. A number of other forms of wording the test are also found: *State v. Arnold* (1861) 12 Ia. 479; *State v. Murphy* (1928) 205 Ia. 1130, 217 N.W. 225 (such mental impairment "as to render it probable that the prisoner cannot, as far as may devolve upon him, have a full, fair and impartial trial"); *Taffe v. State* (1861) 23 Ark. 34 (reason sufficient to appreciate his peril or to act advisedly with counsel); *U.S. v. Chisholm* (1906) 149 Fed. 284 (capacity to comprehend his own condition with reference to the proceedings, control of his mental faculties so as to be able to testify intelligently and give counsel all material facts, and to exercise all his legal rights). And see *People v. Jury* (1930) 252 Mich. 488, 233 N.W. 389, and cases in 3 A.L.R. 94.

⁷ *State v. Helm* (1901) 69 Ark. 167, 173, 61 S.W. 915; *Duncan v. State* (1913) 110 Ark. 523, 162 S.W. 573; *People v. Lawson* (1918) 178 Cal. 722, 174 Pac. 885.

⁸ *Ex parte Chessier* (1927) 93 Fla. 590, 112 So. 87 (capacity "to understand the nature, purpose and effect of the process about to be executed upon him"); *People v. Geary* (1921) 298 Ill. 236, 131 N.E. 652 ("sufficient intelligence to understand the nature of the proceedings against him, what he was tried for originally, the purpose of his punishment, the impending fate which awaits him, and a sufficient mind to know any facts which might exist which would make his punishment unjust or unlawful, and sufficient of intelligence to convey such information to his attorney or the court"); *State v. Genna* (1927) 163 La. 701, 112 So. 655 ("He must

comes insane after the commission of an offense, he shall not be arraigned or tried, and if after trial, he becomes insane, he shall not be sentenced or punished.⁹ This is the wording used in the statutes of some states.¹⁰

Under this form of wording, it has been held that the fact that the defendant is insane is not sufficient; it must further appear that he has become insane since the commission of the offense, in order to be excused from trial;¹¹ or that he has become insane since the verdict, in order to require the passing of sentence to be suspended.¹² In other words, under these decisions, a person who has recently become insane may not be put on trial, but one who has been insane or idiotic for many years,

be capable of understanding the situation in which he stands and the nature of the proceedings against him"); *In re Grammer* (1920) 104 Neb. 744, 178 N.W. 624; *In re Lang* (1908) 77 N.J.L. 207, 71 Atl. 47; *In re Smith* (1918) 25 N. Mex. 48, 176 Pac. 819, 3 A.L.R. 83 and note. And see *Ex parte Schneider* (1893) 21 D.C. 433.

⁹ *State v. Brinyea* (1843) 5 Ala. 241; *Bulger v. People* (1916) 61 Colo. 187, 156 Pac. 800; *State ex rel. Paine v. Potts* (1897) 49 La. Ann. 1500, 22 So. 738; *State v. Church* (1906) 199 Mo. 605, 98 S.W. 16; *State v. Mitchell* (Mo., 1918) 204 S.W. 801; *State v. Vann* (1881) 84 N.C. 722; *Grossi v. Long* (1925) 136 Wash. 133, 238 Pac. 983; *Crocker v. State* (1884) 60 Wis. 553, 556, 19 N.W. 435; Mich. Comp. Laws (1929), §17241, as amended, Pub. Acts, 1931, No. 317, p. 531.

¹⁰ Ark. Dig. Stat. (Crawford & Moses, 1921), §2299; Ill. Rev. Stat. (Smith-Hurd, 1931), chap. 38, par. 593; Me. Rev. Stat. (1930), chap. 149, §10; Mich. Comp. Laws (1929), §17241, as amended Pub. Acts, 1931, No. 317, p. 531; Mo. Rev. Stat. (1929), §3657; Neb. Comp. Stat. (1929), §29-1821; Tex. Complete Stat. (1928), Penal Code, art. 34; Utah Comp. Laws (1917), §9328.

¹¹ *Walker v. State* (1895) 46 Neb. 25, 64 N.W. 357; *State v. Church* (1906) 199 Mo. 605, 98 S.W. 16; *State v. Crane* (1906) 202 Mo. 54, 81, 100 S.W. 422. *Contra*: *People v. Gavrilovich* (1914) 265 Ill. 11, 17, 106 N.E. 521; *People v. Maynard* (1932) 347 Ill. 422, 179 N.E. 833.

¹² *State v. Brinyea* (1843) 5 Ala. 241; *State v. Patton* (1857) 12 La. Ann. 288; *State ex rel. Paine v. Potts* (1897) 49 La. Ann. 1500, 22 So. 738; *Lewis v. State* (1930) 155 Miss. 810, 125 So. 419; *Comm. v. Hays* (1900) 195 Pa. 270, 45 Atl. 728; *Springer v. State* (1911) 63 Tex. Crim. 266, 140 S.W. 99. *Contra*: *Sears v. State* (1900) 112 Ga. 382, 37 S.E. 443.

or even from birth, may be. There seems no logical basis for such a distinction, and no authority for it in the older common law. While the common law writers all used the word "become" in stating the rule,¹³ it does not appear that the cases actually required the defendant to have become insane since the commission of the offense to authorize suspension of the criminal trial, or that the English courts ever held it proper to try a person incapable of conducting a rational defense, if that condition had existed since before the act charged.¹⁴

The reasoning to support the distinction seems to be that since a person who was insane at the time of the criminal act, and still is, may raise the question of his mental condition as a defense

¹³ Blackstone stated the rule as follows: "If a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed." 4 Bl. Comm. 24. Similar wording had been used by Coke and Hale. Blackstone's statement is usually quoted as representing the common law rule.

¹⁴ In *Somervil's Case*, 1 Anderson 104, 107, the question moved was what should be done if a defendant after he is indicted and upon his arraignment, appear to be lunatic or mad ("*de etre lunatique ou madd*"); and it was resolved to inquire by inquest of office whether he was lunatic in fact, or by artifice counterfeited lunacy ("*sil fait lunatique in fait, ou de covin counterfeit lunacy*"). In *Frith's Case* (1790) 22 How. St. Tr. 307, 318, there was evidence that the defendant had been insane for several years before the crime; the jury were instructed that the only question was, "whether he is at this time in a sane or an insane state of mind?" Whether the insanity had arisen since the act, it should be noticed, was not considered. Lord Hale himself did not seem to intend the rule to operate only in favor of those who become insane after the crime, for he said: "If a person of non sane memory commit homicide during such insanity, and continue so till the time of his arraignment, such person shall neither be arraigned nor tried, but committed to gaol, there to remain in expectation of the King's grace to pardon him." 1 Hale P.C. 35. See *People v. Gavrilovich* (1914) 265 Ill. 11, 106 N.E. 521.

on the main trial, there is no reason for holding a separate inquiry into his present mental condition before trial.¹⁵ But a defendant may have other defenses besides insanity; it is entirely consistent, for example, that the defendant was insane and irresponsible at the time of the act, and also that he did the act in self-defense, or by accident. To compel such a defendant to stand trial, although he is still insane, may deprive him of the benefit of such other defenses, which he may be incapable of remembering or of conveying to his counsel or to the court.

When the question of the defendant's present mental capacity is raised after conviction, there is somewhat more reason for requiring that he show that he has become insane since the verdict, for if the question of insanity was raised at the trial, and the defendant found to be sane at the time of the act charged and at the time of the trial, it is necessary, in order to raise a reasonable doubt of his sanity at the time of sentence, to show that his condition has changed since the trial.¹⁶ But that amounts merely to the common-sense statement that after a person has been found to be sane at one given date, in order to prove that he is insane at a later date, it must be shown that his condition has changed in the meantime. This is not the same as laying down an arbitrary rule of law that in all cases, in order to suspend sentence, it must be shown that the defendant has become insane since the verdict.

Burden of Proof. The burden of proof, when present insanity is alleged as a ground for preventing trial, sentence, or execution, is generally said to be upon the defendant, to prove by a preponderance of evidence that he is too unsound mentally to be tried, sentenced, or executed, as the case may be.¹⁷ In one state, however, it has been held that the state must prove sanity by a

¹⁵ *Walker v. State* (1895) 46 Neb. 25, 64 N.W. 357.

¹⁶ *Williams v. State* (1903) 45 Fla. 128, 34 So. 279; *Stover v. Comm.* (1895) 92 Va. 780, 787, 22 S.E. 874.

¹⁷ *State v. Helm* (1901) 69 Ark. 167, 61 S.W. 915; *State v. Lawson*

preponderance of evidence,¹⁸ and in the federal courts, the prosecution must prove beyond a reasonable doubt that the defendant is sane enough to stand trial, sentence, or execution.¹⁹ "The humanity of the law," it has been said in the latter cases, "is such that no man should be considered a proper subject for criminal prosecution, of whose ability to fairly and rationally make a defense there is just ground for reasonable doubt in the mind of the judge or jury which passes on that issue."²⁰

Effect of Statutes on Common Law. In all but a few states, the subject of insanity at the time of criminal proceedings is covered by statutes. To a large extent, these statutes merely enact the common law. Many of the rest change the common-law rules in only one respect—they make a jury trial of the issue mandatory, when a reasonable doubt on the matter is raised, instead of leaving the method of determining such a doubt to the discretion of the judge.²¹

The common-law tests of present insanity have not been altered by statute.²² Usually, the statutes merely outline the procedure to be followed, and do not deal with the degree of unsoundness which must be shown to prevent trial or execution. In some states, however, the legislatures have broadened the common-law test by adding feeble-mindedness and epilepsy as grounds for suspending criminal proceedings and committing the defendant to an institution for mental diseases.²³

We may now consider in detail the statutory procedure of the

(1918) 178 Cal. 722, 174 Pac. 885; *People v. Geary* (1921) 298 Ill. 236, 131 N.E. 652; *State v. Seminary* (1928) 165 La. 67, 115 So. 370; *State v. Myers* (1900?) 7 Ohio N.P. 288; *State v. Tyler* (1898) 7 Ohio N.P. 443; *State v. Bethune* (1911) 88 S.C. 401, 71 S.E. 29.

¹⁸ *Jordan v. State* (1910) 124 Tenn. 81, 88, 135 S.W. 327, 34 L.R.A. (N.S.) 1115.

¹⁹ *U.S. v. Lancaster* (1877) 7 Bissell 440; *U.S. v. Chisholm* (1906) 149 Fed. 284.

²⁰ *U.S. v. Chisholm*, *supra*.

²¹ See *post*, p. 355.

²² See p. 347, note 46.

²³ See p. 382 *et seq.*

various states for determining the question of present mental condition at each of the stages at which that question may be raised.

§2. PRESENT INSANITY BEFORE INDICTMENT

At Time of Preliminary Examination. The earliest opportunity at which a defendant's present mental condition may be questioned is when he is first brought before an examining magistrate on a charge of crime. The question very seldom arises at this stage, however; usually both the magistrate and the defense prefer to leave the question to the trial court. In cases of minor crimes, triable by the magistrate himself, the question of the defendant's mental capacity to make a rational defense must of course be decided by the magistrate when properly raised, but the question is not often raised in these petty cases.

The question of present sanity at this stage of the proceedings has not generally been made the subject of statutory regulation. Maryland and Mississippi, however, have enacted legislation which permits the mental condition of a person who appears to be insane when first brought before a magistrate on a charge of crime to be determined at once, without waiting until further proceedings in the criminal prosecution are heard.

The Maryland law²⁴ provides that in such cases the court shall commit the defendant to jail or to some institution for the insane designated by the Board of Mental Hygiene. The board must be notified of the commitment, and must thereupon make an examination of the person, and report its findings to the court or justice then having jurisdiction over him. In cases not punishable by death or imprisonment in the penitentiary, the examination and report may be made by the superintendent of the insane institution in which the person may be confined. If found insane, the person must be retained in custody until he is tried,

²⁴ Md. Ann. Code (1924), art. 59, §10.

or until the court shall direct that he be confined in an insane institution.

In Mississippi,²⁵ when a person brought before a conservator of the peace appears in the course of investigation to have been insane at the time of the commission of the act, and still to be insane, the chancery court must be notified, and the person must be proceeded against in that court as in non-criminal lunacy cases.

At Time of Grand Jury Proceedings. The grand jury may refuse to return an indictment against a person whom it believes to be at that time so mentally disordered that he should not presently be subjected to the ordeal of a trial (or who, it believes, was so disordered at the time of the act that he should not be held responsible for it; this latter situation has already been discussed²⁶). In eleven states,²⁷ there are statutes which provide a method for committing persons whom the grand jury fails to indict because of "insanity." The Ohio act refers definitely to present insanity, but the other ten do not make it clear whether the "insanity" mentioned refers to the time of the act, or the time of the grand jury's deliberations.²⁸ It would seem that they apply to either case. In the remaining thirty-seven states, there are no statutory provisions for the situation where the grand jury fails to indict a person because it believes him to be insane. Nor does the common law seem to contemplate such action.²⁹

²⁵ Miss. Code (1930), §1325.

²⁶ See *ante*, p. 254.

²⁷ Ala. Crim. Code (1928), §4578; La. Rev. Stat. (1915), §3476; Me. Rev. Stat. (1930), chap. 149, §2; Mass. Gen. Laws (1921), chap. 277, §16; Miss. Code (1930), §1326; N.H. Pub. Laws (1926), chap. 369, §§1, 3; N.J. Laws, 1922, chap. 101, §3 (Cum. Supp., 1911-1924), §53-133p; N.C. Code (1930), §6237; Ohio Ann. Code (1930), §13441-1; Utah Comp. Laws (1917), §9328; Vt. Gen. Laws (1917), §2603.

²⁸ West Virginia also has a similar provision, which, however, refers only to cases where a person is not indicted "by reason of his insanity at the time of committing the act." W. Va. Off. Code (1931), §62-2-12.

²⁹ In *U.S. v. Lawrence* (1835) 4 Cranch C.C. 514, 26 Fed. Cas.,

Of the eleven states in which the subject is regulated by statute, the majority provide that when a person escapes indictment on the ground of "insanity," the court shall "carefully inquire and ascertain whether his insanity in any degree continues,"³⁰ and if it finds that it does, or if satisfied that he is insane,³¹ or that his discharge would be dangerous,³² shall order him committed to the proper hospital for the insane. Most of these statutes do not provide how the "careful inquiry" whether insanity "in any degree continues," or whether the defendant is "dangerous," is to be conducted. The North Carolina and Utah acts, however, outline in detail the procedure to be followed. A jury trial is mandatory in Utah, and discretionary with the court in Ohio. If the court impanels a jury, the Ohio law provides, such a jury may return a three-fourths verdict. In Mississippi, a person whom the grand jury fails to indict because of insanity is turned over to the chancery court, for commitment proceedings.

County Commission of Insanity: Iowa. Iowa has no statute providing for the case where a grand jury fails to indict because of insanity. However, the county commission of insanity, composed of the clerk of the district court, one reputable physician in actual practice, and one reputable attorney in actual practice, each appointed by the district court for a term of two years, has jurisdiction over all applications for the commitment of insane persons, except persons being held in custody under an indictment or information.³³ The commission does not lose jurisdiction over a person, if, after it has acquired jurisdiction, the district court also acquires jurisdiction on a formal charge of crime.³⁴

No. 15,576, it was held that the grand jury has no right to consider mere matter of justification or excuse, or exculpatory matter.

³⁰ Alabama, New Jersey. For citation to the statutes, see note 27, *ante*.

³¹ Massachusetts.

³² Louisiana, New Hampshire, North Carolina, Vermont.

³³ Iowa Code (1931), §§3533, 3534, 3540.

³⁴ *Ibid.*, §§3544-3555.

The unfortunate feature of this provision is that it promotes a race for jurisdiction between the commissioners of insanity and the district court. Relatives and friends of a person who has committed an offense, if there is any ground to suspect that he is mentally deranged or deficient, will usually prefer to have that question determined by the county commissioners on a civil application for commitment, rather than by the district court in the course of criminal proceedings. One reason for this is that in the action before the commissioners, the "insanity" which will justify an order of commitment includes "every species of insanity or mental derangement,"³⁵ while in the district court, mental derangement, to avail the defendant, must be shown to be such as to deprive him of the knowledge of right and wrong with regard to the act charged (to entitle him to an acquittal), or such as to render him incompetent to conduct his defense (and therefore requiring suspension of the trial). Another reason is that while the commissioners commit persons found insane to a state hospital, and district court, if a defendant is found presently insane and dangerous to public peace or safety, must order him committed to the department for criminal insane at the penitentiary.

When an indictment seems imminent, therefore, those acting in behalf of the prospective defendant will be apt to rush before the county commissioners with an application to have him adjudged insane, and thus bring him under the commission's jurisdiction before the prosecuting officials succeed in having an indictment returned. That such a race for jurisdiction does result in practice, is revealed in the Iowa cases.³⁶

Inquiry on Application of Penal Authorities: Pennsylvania.

³⁵ Iowa Code (1931), §3580.

³⁶ *Stone v. Conrad* (1898) 105 Ia. 21, 74 N.W. 910; *Quaintance v. Lamb* (1919) 185 Ia. 237, 170 N.W. 398; *State v. Murphy* (1928) 205 Ia. 1130, 217 N.W. 225.

In Pennsylvania, while there is no statutory provision directly dealing with the determination of a defendant's mental condition before indictment, the Mental Health Act of 1923³⁷ does provide that when "any person detained in prison, whether waiting trial or undergoing sentence, or detained for any other reason (e.g., as a witness)," shall in the opinion of the jail authorities be insane, the court must order an inquiry by two qualified physicians. New Jersey³⁸ also provides for an inquiry by the court, upon proper application, into the sanity, feeble-mindedness, or epilepsy of any person "in confinement under commitment, indictment, or sentence, or under any process." These provisions will be more fully discussed in connection with insanity raised after indictment, at the time of trial.³⁹ Here, it is only necessary to call attention to the fact that the provisions, including as they do all persons detained in prison under any process, are broad enough to include persons not yet indicted but merely held to await the action of the grand jury.

Place of Confinement. Almost all the statutes providing for the commitment of persons who escape indictment by reason of insanity, or who are found by the court or other authorities to be insane before an indictment is returned, provide that if found to be insane, such persons are to be confined in a hospital or other institution for the insane. In New Hampshire, however, the court may commit such a person "to the prison or to the asylum for the insane," and in Vermont, in the county jail, or the state hospital for the insane, or some other suitable place.⁴⁰

Procedure on Recovery. Upon the recovery of a person who escaped indictment because of insanity and who was thereupon

³⁷ Pa. Laws, 1923, No. 414, §308, p. 1007.

³⁸ N.J. Laws, 1918, chap. 147, §437, N.J. Comp. Stat. (Cum. Supp., 1911-1924), §34-188.

³⁹ See p. 346 *et seq.*, especially pp. 347, 382.

⁴⁰ N.H. Pub. Laws (1926), chap. 369, §1; Vt. Gen. Laws (1917), §2603.

however, enlarge the test by including feeble-mindedness as a reason for suspending criminal proceedings.⁴⁷ Eight others state the rule to be that if a defendant, after the commission of the offense, become insane, he shall not be tried, etc.⁴⁸

A few statutes providing for the procedure to be followed where the defendant's present mental capacity to undergo trial is in question refer only to defendants "in confinement."⁴⁹ Such a statute, it has been held, does not apply to persons out on bail.⁵⁰ Where the legislature has not employed this phrase, it has been held that a person out on bail comes within the statute.⁵¹

lunacy or insanity so as to be incapable of understanding the proceeding or making his defense." Consol. Laws (Cahill, 1930), chap. 41, §1120. *Minnesota*: Similar to above. Stat. (1927), §9915. *Indiana*: "Comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense." Ann. Stat. (Burns, 1926), §2295.

The western code states have a provision that a person cannot be tried, convicted, or punished "while he is insane." *Arizona*: Penal Code (1928), §4489; *California*: Penal Code (1931), §1367; *Idaho*: Comp. Stat. (1919), §9166; *Montana*: Rev. Codes (1921), §12213; *Nevada*: Comp. Laws (1929), §11183; *North Dakota*: Comp. Laws (1913), §11063; *Oklahoma*: Stat. (1931), §3211; *South Dakota*: Comp. Laws (1929), §4793; *Texas*: Complete Stat. (1928), Penal Code, art. 34; *Utah*: Comp. Laws (1917), §9327. Virginia and West Virginia provide that a person cannot be "tried" while he is insane. Va. Code (1930), §4908; W. Va. Off. Code (1931), §62-3-9.

However, such statutory provisions are not to be taken literally to mean that any possible form of insanity, no matter how slight, will prevent a person's being tried, sentenced, or punished. The "insanity" referred to in the statutes is such as comes within the common law test, i.e., such as prevents his being able to conduct a rational defense. *Re Buchanan* (1900) 129 Cal. 330, 61 Pac. 1120, 50 L.R.A. 378; *Freeman v. People* (1847) 4 Denio (N.Y.) 9, 24; *Marshall v. Terr.* (1909) 2 Okla. Crim. 136, 101 Pac. 139.

⁴⁷ See *post*, p. 382.

⁴⁸ See *ante*, p. 337, note 10.

⁴⁹ Ala. Code (1928), §§4575, 4577; Conn. Gen. Stat. (1930), §6431; N.J. Laws, 1918, chap. 147, §437, N.J. Comp. Stat. (Cum. Supp. 1911-1924), §34-188; N.Y. Code of Crim. Proc., §836; Wyo. Rev. Stat. (1931), §56-111.

⁵⁰ *Ex parte Trice* (1875) 53 Ala. 546.

⁵¹ *People v. Hall* (1915) 185 Mich. 54, 151 N.W. 687.

1. *How and by Whom the Question May be Raised.* The procedure provided by the statutes may be considered with reference to two questions: (1) how the issue of present insanity is raised, and (2) having been properly raised, how it is adjudicated.

As to the first question, the common-law procedure requires no specific formality.⁵² The suggestion may be made orally, by affidavit, or in any other manner;⁵³ the form is unimportant so long as a sufficient showing to create a reasonable doubt is in fact made. The question may be raised not only by the defendant or his counsel, but by any person; by counsel for the prosecution,⁵⁴ or by the court on its own motion, upon observation of the defendant's appearance or conduct in court.⁵⁵

This common-law rule has not been changed by most of the state statutes, which usually provide merely that an inquiry shall

⁵² *Youtsey v. U.S.* (1899) 97 Fed. 937, 941; *Wilhite v. State* (1923) 158 Ark. 290, 250 S.W. 31; *Johnson v. State* (1909) 57 Fla. 18, 49 So. 40; *State v. Ossweiler* (1922) 111 Kans. 358, 367, 207 Pac. 832, 836; *State v. Detar* (1928) 125 Kans. 218, 263 Pac. 1071; *White v. Comm.* (1922) 197 Ky. 79, 245 S.W. 892; *State v. Reed* (1889) 41 La. Ann. 581, 7 So. 132; *State v. Burnham* (1927) 162 La. 737, 111 So. 79; *State v. Genna* (1927) 163 La. 701, 112 So. 655; *Steward v. State* (1905) 124 Wis. 623, 102 N.W. 1079.

⁵³ *State v. Reed, supra*; *State v. Burnham, supra*; *Steward v. State, supra*; *State v. Brotherton* (1930) 131 Kans. 295, 291 Pac. 954. In *Youtsey v. U.S.* (1899) 97 Fed. 937, the matter was raised by an application for a continuance. It was held that the form of the objection did not relieve the court from determining the question, sufficient *prima facie* evidence having been shown in support of the application to raise a reasonable doubt of the defendant's present sanity.

⁵⁴ *Ormsby v. U.S.* (1921) 273 Fed. 977, 987 ("a public officer charged with enforcing the criminal law is inherently charged with the duty of invoking laws of this character, not only for the protection of society, but of those accused of crime"); *State v. Brotherton* (1930) 131 Kans. 295, 291 Pac. 954.

⁵⁵ *Johnson v. State* (1909) 57 Fla. 18, 49 So. 40; *State v. Detar* (1928) 125 Kans. 218, 263 Pac. 1071; *State v. Genna* (1927) 163 La. 701, 112 So. 655; *Marshall v. Terr.* (1909) 2 Okla. Crim. 136, 101 Pac. 139.

be had if the court "has reasonable grounds to believe" that the defendant is insane,⁵⁶ or if the court is so informed "in any manner,"⁵⁷ or by "any person,"⁵⁸ or "if a doubt arises,"⁵⁹ without stating how the insanity should be made to appear, or the doubt raised.

In a few states, on the other hand, the statutes seem to contemplate that the application shall be made only by penal or institutional officials.⁶⁰ In others, the question may be raised either by the officers having the person in charge, or by a private individual in his behalf.⁶¹

The application is required to be in writing in New Jersey,⁶² and to be accompanied by the certificate of a reputable physician in Ohio,⁶³ and by the certificates of two physicians in New Jersey⁶⁴ and Texas.⁶⁵ However, it has been held that this is not an arbitrary requirement, and if it otherwise comes to the notice

⁵⁶ Ark. Dig. of the Stat. (Crawford & Moses, 1921), §3055; Ky. Codes (Carroll, 1927), Crim. Code of Prac., §156; Mo. Rev. Stat. (1929), §3657; Va. Code (1930), §4909.

⁵⁷ Wis. Stat. (1931), §357.13 (1).

⁵⁸ Ind. Ann. Stat. (Burns, 1926), §2295.

⁵⁹ Ala. Code (1928), §4575; Idaho Comp. Stat. (1919), §9167; Iowa Code (1931), §13905; Mont. Rev. Codes (1921), §12214; Nev. Comp. Laws (1929), §11184; N. Dak. Comp. Laws (1913), §11064; Okla. Stat. (1931), §3213; S. Dak. Comp. Laws (1929), §4794; W. Va. Off. Code (1931), §62-3-9.

⁶⁰ Conn. Gen. Stat. (1930), §6431 (sheriff); R.I. Gen. Laws (1923), §1617 (officer having person in custody or agent of state charities).

⁶¹ N.J. Laws, 1918, chap. 147, §§402, 437, N.J. Comp. Stat. (Cum. Supp., 1911-1924), §34-188; Tex. Complete Stat. (1928), Code of Crim. Proc., art. 922, as amended, Gen. Laws, 1931, chap. 54; Wyo. Rev. Stat. (1931), §56-111.

⁶² N.J. Laws, 1918, chap. 147, §§402, 437, N.J. Comp. Stat. (Cum. Supp., 1911-1924), §34-188.

⁶³ Ohio Ann. Code (1930), §13441-1.

⁶⁴ N.J. Laws, 1918, *loc. cit.*

⁶⁵ Tex. Complete Stat. (1928), Code of Crim. Proc., art. 922, as amended, Gen. Laws, 1931, chap. 54 (or by affidavit of the prison physician or hospital superintendent or county physician).

of the court that the defendant is insane, an inquiry should be instituted, even though certificates are not presented.⁶⁶

Special Plea of Present Insanity. The question of the defendant's present mental capacity to stand trial is raised by a special plea in Colorado, Georgia, Louisiana, and Tennessee.⁶⁷ The Georgia and Tennessee acts do not expressly require that the question must be raised by special plea, but provide merely that if a special plea of present insanity is filed, the issue shall be submitted to a jury, etc. The courts, however, have construed the statutes to mean that the special plea is the only permissible method of raising the question.⁶⁸

The Colorado plea is required to be in the form, "not guilty by reason of insanity since the time of the alleged commission of the crime," or "not guilty by reason of insanity at the time of the alleged commission of the crime and since." This is anomalous phrasing, for the question of "guilt" is not involved in a plea of insanity "since the time of the alleged commission of the crime." In Tennessee, it seems to be the practice to have the plea verified by the oath of a friend of defendant.⁶⁹

Routine Examination of Certain Classes of Offenders. Massachusetts has eliminated the problem of how the defendant's possible mental disorder at the time for trial is to be called to the attention of the court, by requiring that all of certain enumerated classes of defendants, before trial, must be given a routine mental examination by experts of the Department of Mental

⁶⁶ *Evans v. State* (1930) 123 Ohio 132, 174 N.E. 348.

⁶⁷ Colo. Laws, 1927, chap. 90; Ga. Code (1926), §976; La. Code of Crim. Proc. (1928), §§267, 268; Tenn. Ann. Code (1917), §2631 (repealed "in so far as in conflict with" Acts, 1919, chap. 17, which, however, seems not to be in conflict with this provision).

⁶⁸ *Danforth v. State* (1885) 75 Ga. 614; *Fogarty v. State* (1888) 80 Ga. 450, 457, 5 S.E. 782; *Dove v. State* (1872) 50 Tenn. 348; *Firby v. State* (1874) 62 Tenn. 358; *Green v. State* (1890) 88 Tenn. 634, 14 S.W. 489.

⁶⁹ *Jordan v. State* (1910) 124 Tenn. 81, 135 S.W. 327, 34 L.R.A. (N.S.)

Diseases.⁷⁰ The Massachusetts law applies to all persons indicted for a capital offense, and all persons indicted for any other offense who are known to have been previously indicted more than once, or to have been convicted of a felony. Whenever such a person is indicted or bound over for trial in the superior court, the Department is required to examine the defendant to determine his mental condition. A report of this investigation is filed with the court, and this report is accessible to the prosecution and the defense. The Massachusetts law has aroused much comment, and will be more fully discussed in the following chapter.⁷¹

Showing Made Must be Sufficient to Raise Reasonable Doubt in Judge's Mind. However presented, the evidence relied upon to require a hearing on the issue of present capacity to stand trial must be sufficient to raise a reasonable doubt in the mind of the judge. Most of the existing statutes require an investigation of the issue only "if a doubt arises," or "if the court has reasonable grounds to believe," or "if the defendant appear to be insane." An inquest on the matter is therefore not required upon a bare unsupported suggestion that the defendant is insane,⁷² or even upon a suggestion supported by affidavits,⁷³ or by the testimony of witnesses,⁷⁴ unless the showing is sufficient to create a reasonable doubt in the judge's mind. But if such a doubt is raised, an inquiry is necessary, and cannot be waived.⁷⁵ Whether the show-

⁷⁰ Mass. Acts, 1929, chap. 105.

⁷¹ See p. 401 *et seq.*

⁷² *Howell v. Todhunter* (1930) 181 Ark. 250, 25 S.W. (2d) 21; *People v. Croce* (1929) 208 Cal. 123, 280 Pac. 526; *State v. Khoury* (1908) 149 N.C. 454, 62 S.E. 638.

⁷³ *State v. Mitchell* (Mo., 1918) 204 S.W. 801; *Webber v. Comm.* (1888) 119 Pa. 223, 13 Atl. 427; *Kearns v. State* (1914) 14 Okla. Crim. 142, 148, 168 Pac. 242; *State v. Harrison* (1892) 36 W. Va. 729, 739, 15 S.E. 982.

⁷⁴ *Bulger v. People* (1916) 61 Colo. 187, 156 Pac. 800; *State v. Arnold* (1861) 12 Ia. 479; *State v. Peterson* (1900) 24 Mont. 81, 60 Pac. 809.

⁷⁵ *People v. Ah Ying* (1871) 42 Cal. 18; *People v. Grace* (1926) 77 Cal. App. 752, 247 Pac. 585.

ing made is such as to create a reasonable doubt on the subject is a matter resting in the sound discretion of the trial judge, and his ruling will not be overruled by the upper court, unless it was clearly arbitrary and an abuse of discretion.⁷⁶ The courts are generally reluctant to find that this discretion has been abused, even when they feel that it has not been wisely exercised.⁷⁷

This rule perhaps does not hold true in the four states where a special plea of present insanity is provided for. Under the statutes of these states it seems that the formal plea is all that is

⁷⁶ *Granberry v. State* (1913) 184 Ala. 5, 63 So. 975; *Rohn v. State* (1914) 186 Ala. 5, 65 So. 42; *Fralick v. State* (1923) 25 Ariz. 4, 212 Pac. 377; *Wilhite v. State* (1923) 158 Ark. 290, 250 S.W. 31; *People v. Geiger* (1897) 116 Cal. 440, 48 Pac. 389; *People v. Hettick* (1899) 126 Cal. 425, 58 Pac. 918; *People v. Oppenheimer* (1909) 156 Cal. 733, 106 Pac. 74; *People v. Loomis* (1915) 170 Cal. 347, 149 Pac. 581; *People v. Fountain* (1915) 170 Cal. 460, 150 Pac. 341; *People v. Keyes* (1918) 178 Cal. 794, 802, 175 Pac. 6; *People v. Croce* (1929) 208 Cal. 123, 280 Pac. 526; *Gonzales v. U.S.* (1913) 40 App. D.C. 450, 454; *Davidson v. Comm.* (1916) 171 Ky. 488, 188 S.W. 631; *White v. Comm.* (1922) 197 Ky. 79, 245 S.W. 892; *State v. Peterson* (1900) 24 Mont. 81, 60 Pac. 809; *State v. Howard* (1904) 30 Mont. 518, 77 Pac. 50; *State v. Vetter* (1926) 77 Mont. 66, 249 Pac. 666; *State v. Schlaps* (1927) 78 Mont. 560, 576, 254 Pac. 858; *Comm. v. Cilione* (1928) 293 Pa. 208, 216, 142 Atl. 216; *State v. Kelley* (1902) 74 Vt. 278, 282, 52 Atl. 434.

⁷⁷ See, for example, *Jones v. State* (1848) 13 Ala. 153, where the court, although it felt that "the evidence strongly indicated, *perhaps was conclusive*, of the prisoner's insanity at the time of the trial," nevertheless held: "Although we are of the opinion that the facts disclosed in the bill of exceptions might well have warranted the preliminary inquiry as to the prisoner's mental condition, yet this must be left to the sound discretion of the court. If, amid the mystery and veil which shrouds the phenomena of mental aberration, so difficult to penetrate, the judge should be mistaken, and try an insane man (*as we incline to think has been done in the case before us*) it will present a case in which there may be a strong appeal to executive clemency." (Italics added.) See also *People v. Rosner* (1926) 78 Cal. App. 497, 248 Pac. 683, where the defendant "fired" the lawyer appointed to defend him, conducted his own defense in a jovial and boisterous manner, and rested his case with a nonsensical song to the jury. They found him guilty. On the day set for judgment, attorneys appeared for him and moved for a hearing on insanity, alleging that the defendant

required to entitle the defendant to a hearing on the subject; no evidence need be introduced to create a reasonable doubt on the matter, in support of the plea.⁷⁸ Similarly, it has been held in Texas that upon a motion presented in proper form, defendant has a right to have a jury impaneled to try the question of present insanity.⁷⁹ However, it seems that only one such hearing can be demanded as a matter of right. If the defendant is found sane, he cannot demand another hearing on his sanity a short time later.⁸⁰

2. *How the Issue is Tried.* A reasonable doubt of the defendant's mental capacity to make a defense having been properly raised, either by informal suggestion, or on observation of the court itself, or upon formal application verified by the certificates of physicians, or upon a special plea where such formalities are required, the second question is, how the issue shall be adjudicated. The procedure set up by the various state statutes for trying the issue will be reviewed in detail in this section, but, in general, it may be said that in about a third of the states, the statutes permit the trial court the same discretion it enjoyed at common law to determine the method of trying the question—whether by investigation by the judge himself, or by a jury, or a commission, etc. A few of these states have added the requirement that if the judge investigates the question himself, he must appoint a stated number of physicians to testify on the hearing. About twenty states have altered the common law by divesting the judge of this discretion, and have made a jury trial mandatory.

was incapable of conducting a rational defense, and submitting affidavits in support of the allegation. The request was refused, and on appeal, it was held that the refusal did not constitute a clear abuse of discretion.

⁷⁸ Colorado, Georgia, Louisiana, Tennessee. See *ante*, note 67.

⁷⁹ *Pickett v. State* (1929) 113 Tex. Crim. 395, 22 S.W. (2d) 136; *Norford v. State* (1931) 116 Tex. Crim. 533, 34 S.W. (2d) 290. See also *People v. Geary* (1921) 298 Ill. 236, 131 N.E. 652.

⁸⁰ *Flanagan v. State* (1908) 103 Ga. 619, 30 S.E. 550.

Trial by Court or Jury. As already said, at common law, the method of determining the defendant's present mental condition rests in the discretion of the trial judge. He may impanel a jury if he sees fit, or decide the question himself. This discretion is expressly reserved in the statutes of seven states.⁸¹ Eight other states provide for a hearing by the court, but do not specifically state whether the court may impanel a jury.⁸² In two of these states, however, it has been held that the court has this power.⁸³

Under the statutes of a score of states, when the issue of present insanity is properly raised or a doubt arises, a jury trial is mandatory.⁸⁴ In Pennsylvania, the court may, in its discretion, appoint a commission of three, two of whom must be "qualified physicians," to examine the defendant, and may determine the

⁸¹ *Alabama*: Code (1928), §4577 (misdemeanor cases only; in felony cases, a jury trial is required. *Ibid.*, §4575); *Kentucky*: Stat. (Carroll, 1930), §§216aa-68 to 216aa-74 (jury trial may be granted by court, and may be demanded by defendant); *Michigan*: Comp. Laws (1929), §17241, as amended, Pub. Acts, 1931, No. 317, p. 531; *New York*: Code of Crim. Proc., §836; *Ohio*: Ann. Code (1930), §13441-1; *Pennsylvania*: Stat. (1920), §14446; *Virginia*: Code (1930), §4909; *Wisconsin*: Stat. (1931), §357.13 (1).

⁸² *Indiana*: Ann. Stat. (Burns, 1926), §2295; *Iowa*: Code (1931), §§13905, 13906; *Kansas*: Rev. Stat. (1923), §62-1531; *Massachusetts*: Gen. Laws (1921), chap. 123, §100; *Minnesota*: Gen. Stat. (1927), §10722; *New Jersey*: Comp. Stat. (Cum. Supp., 1911-1924), §34-188; *North Carolina*: Code (1931), §6237; *South Carolina*: Code of Laws (1932), §6239.

⁸³ *State v. Hagerty* (1922) 152 Minn. 502, 189 N.W. 411; *State v. Bethune* (1911) 88 S.C. 401, 71 S.E. 29.

⁸⁴ *Alabama*: Code (1928), §4575 (in felony cases only); *Arizona*: Rev. Code (1928), §5197; *Arkansas*: Dig. Stat. (Crawford & Moses, 1921), §3055; *California*: Penal Code (1931), §1368; *District of Columbia*: Code (1929), Title 6, §374; *Georgia*: Code (1926), Penal Code, §976; *Idaho*: Comp. Stat. (1919), §9167; *Illinois*: Rev. Stat. (Smith-Hurd, 1931), chap. 38, §593; *Kentucky*: Codes (Carroll, 1927), Crim. Code of Prac., §156; *Maryland*: Laws, 1931, chap. 436, p. 1108; *Missouri*: Rev. Stat. (1929), §3657; *Montana*: Rev. Codes (1921), §12214; *Nebraska*: Comp. Stat. (1929), §29-1821; *New Mexico*: Stat. Ann. (1929), §105-2227; *North Dakota*: Comp. Laws (1913), §11064; *Oklahoma*: Stat. (1931), §3212;

issue upon their report and such other evidence as it may wish to take;⁸⁵ or it may grant a jury trial on the issue, preliminary to the main trial, or submit the question of the defendant's present mental condition to the jury trying him for the crime.⁸⁶ When the latter course is followed, the jury should be instructed that if they find the defendant to be presently insane, they should not proceed to pass upon the question of his guilt or innocence. If they do nevertheless find him guilty, although finding him presently insane, the court should disregard the verdict of conviction.⁸⁷ This practice of submitting the question of present sanity to the same jury trying the defendant on the criminal charge has been disapproved in other jurisdictions, and is now used in only two or three other states.⁸⁸

Court's Discretion to Grant Jury Trial. Even in the score or more of states where a jury trial is the only permissible method of trying the question, the court still retains a certain discretion to determine whether or not a sufficient showing has been made to require such a trial. In other words, the statutes of these states have divested the trial judge of any discretion as to the mode of trying the question, but have not divested him of the discretion of deciding whether or not an adjudication of the question has become necessary or proper. Thus, the form of statute found in the western states requires a jury to be impaneled "if a doubt arises." This doubt must arise in the mind of the judge, and if

South Dakota: Comp. Laws (1929), §4794; *Texas:* Complete Stat. (1928), Code of Crim. Proc., art. 921 (refers only to insanity after conviction, but should be applied "in substance and in spirit" when question arises before conviction. *Ex parte Wilson* [1912] 67 Tex. Crim. 369, 149 S.W. 117); *Utah:* Comp. Laws (1917), §9329; *West Virginia:* Off. Code (1931), §62-3-9; *Wyoming:* Rev. Stat. (1931), §§56-105, 56-111.

⁸⁵ Pa. Acts, 1923, No. 414, §308, p. 1007.

⁸⁶ Pa. Stat. (1920), §14446; *Taylor v. Comm.* (1885) 109 Pa. 262; *Webber v. Comm.* (1888) 119 Pa. 223, 13 Atl. 427; *Comm. v. Endrukut* (1911) 231 Pa. 529, 80 Atl. 1049; *Comm. v. Scovern* (1928) 292 Pa. 26, 140 Atl. 611; *Comm. v. Cilione* (1928) 293 Pa. 208, 216, 142 Atl. 216.

⁸⁷ *Comm. v. Endrukut, supra.*

⁸⁸ See *post*, p. 373.

he has no reasonable doubts on the matter, he need not call a jury. However, he must not be arbitrary or unreasonable in the exercise of this discretion, and if his refusal to submit the question to a jury is clearly unreasonable or oppressive, the upper court may reverse the decision.⁸⁹

In a few states, the effect of the statute seems to be to deprive the judge of this power also. Under the Georgia act, for example, it seems that whenever the special plea of present insanity is made, the criminal proceedings must be halted and a jury impaneled to try the issue on that plea, and no reasonable showing in support of the plea seems to be required.⁹⁰ The Texas court has also said that upon a motion presented in proper form, a jury trial is mandatory.⁹¹

Court's Power to Hear Evidence in Deciding Whether Jury Trial is Necessary. A further question sometimes raised in the states where a jury trial is mandatory is whether the court, in determining whether a reasonable doubt as to sanity exists, may itself make a preliminary investigation and hear evidence. Any affidavits submitted in support of the petition, and the defendant's conduct and appearance in court, will presumably be considered by the judge; the question is whether in addition he may call witnesses and hear testimony, to determine whether there is a reasonable doubt of the defendant's mental capacity to stand trial. On the one hand, it may be argued that since the judge is required to call a jury only if a reasonable doubt exists, he should not be required to call or refuse a jury upon the bare suggestion of present insanity, but should have power to ascertain whether or not the suggestion is supported by evidence of a substantial

⁸⁹ See cases cited *ante*, note 76.

⁹⁰ *Flanagan v. State* (1898) 103 Ga. 619, 30 S.E. 550.

⁹¹ *Pickett v. State* (1929) 113 Tex. Crim. 395, 22 S.W. (2d) 136; *Norford v. State* (1931) 116 Tex. Crim. 533, 34 S.W. (2d) 290. See also *People v. Geary* (1921) 298 Ill. 236, 131 N.E. 652. A similar decision was reached under an older Ohio statute, since repealed. *State v. Roselot* (1903) 69 Ohio 91, 68 N.E. 825.

character. This reasoning has been adopted by the greater number of cases; the court, it is held, upon a suggestion of present insanity, may call for expert testimony and other evidence, and if, upon this evidence, the court has no reasonable doubt of the defendant's sanity, it should refuse a jury trial.⁹² On the other hand, in Illinois it has been held that the court has no power to make such an inquiry; the fact that the trial court felt it necessary to hear evidence on the matter, the Illinois court has said, shows that it had some doubt on the matter, and in all such cases, the statute requires that a jury be impaneled to try the question.⁹³

Inquiry by Court Other than Trial Court. In a few states, the

⁹² "In determining whether a reasonable doubt exists as to his sanity, before impaneling the jury, the judge is not confined alone to the case made for the prisoner by his counsel; nor to suggestions to that effect made by his relations or other persons for him, but may in his discretion investigate the whole matter thoroughly, take into consideration all the circumstances, obtain all the light reasonably attainable and from all the facts thus developed, determine whether the necessity exists for the inquiry." *State v. Arnold* (1861) 12 Ia. 479. Accord: *Bulger v. People* (1916) 61 Colo. 187, 156 Pac. 800; *State v. Harrison* (1892) 36 W. Va. 729, 15 S.E. 982, 18 L.R.A. 224. This practice has also been approved by implication by a number of other courts. *People v. Pico* (1882) 62 Cal. 50, 55; *People v. Gilberg* (1925) 197 Cal. 306, 315, 240 Pac. 1000; *Turner v. Comm.* (1921) 191 Ky. 825, 231 S.W. 519; *State v. Church* (1906) 199 Mo. 605, 98 S.W. 16; *State v. Crane* (1906) 202 Mo. 54, 100 S.W. 422.

⁹³ *People v. Geary* (1921) 298 Ill. 236, 131 N.E. 652. The court cited six cases to support its decision. Of these, two were based upon statutes different from that of Illinois, in that both made a jury trial mandatory whenever an application supported by the certificate of a physician was presented. *State v. Roselot* (1903) 69 Ohio 91, 68 N.E. 825; *Sears v. State* (1900) 112 Ga. 382, 37 S.E. 443. The other four do not support the Illinois court's decision. On the contrary, in one of them, the court expressly said that "*it is the duty of the court to inquire into the truth of the allegation*, and if it finds that there are reasonable grounds for believing it, to order a jury to be impaneled to determine the question." *State v. Helm* (1901) 69 Ark. 167, 171, 61 S.W. 915. The Geary case has perhaps been overruled on this point. See *People v. Maynard* (1932) 347 Ill. 422, 179 N.E. 833.

question of the defendant's mental condition before trial may be investigated by some other court than that in which the indictment is pending. Thus in Connecticut,⁹⁴ the inquiry may be made by any judge of the superior court; in Rhode Island,⁹⁵ it must be made by the presiding justice, or in his absence, any other justice of the superior court. In Maine,⁹⁶ a person under indictment becoming insane before final conviction may be committed "by any judge of the supreme judicial court, or judge of the superior court in the county where such person is to be tried." In New York,⁹⁷ such a person may be committed by "a judge of a court of record of the city or county, or a justice of the supreme court of the judicial district," in all cases outside the city of New York. In New York City, however, the commitment is made by "the judge or magistrate of the court having jurisdiction over the proceedings."

Appointment of Physicians to Aid Court. A few of the states which permit the court to pass upon the defendant's sanity itself, without a jury, require the court in the course of its investigation to appoint one or two reputable physicians to examine the defendant and testify at the hearing.⁹⁸ In Virginia, the court may appoint physicians not to exceed three, but is not required to do so.⁹⁹ Even without statutory provision, a court has the power to appoint experts, if it wishes, and this is the usual practice in some courts. The statutes, it should be noticed, only require the court to call "reputable" or "competent" physicians; special knowledge or experience in mental diseases is not considered necessary, except perhaps in Virginia, where the statute

⁹⁴ Conn. Gen. Stat. (1930), §6431.

⁹⁵ R.I. Gen. Laws (1923), §1617.

⁹⁶ Me. Rev. Stat. (1930), chap. 149, §10.

⁹⁷ N.Y. Code of Crim. Proc. (1928), §836.

¹ In Alabama, the court must call a respectable physician; in Indiana and Kentucky, two physicians, and in Michigan "two or more reputable physicians." For citations to the statutes, see notes 81 and 82, *ante*.

⁹⁹ Va. Code (1930), §4909.

seems to contemplate that, if possible, the court should appoint physicians "skilled in the diagnosis of insanity."

Appointment of Commission to Aid Court. In some states, the courts are empowered to appoint not merely individual physicians, but commissions of insanity, to examine the defendant and submit a report to the court. These commissions are usually required to be made up of a stated number of physicians, or physicians and lawyers, but they are not usually composed of specialists experienced in detecting the existence of mental defect or disease. The findings of the commission are not usually made binding on the court; other evidence may be taken, and the determination of the question must be by the court, on the basis of all the evidence, including the report of the commission.

Such a commission, composed of three persons, two of them "qualified physicians" and the other a lawyer, may be appointed in Pennsylvania, under the Mental Health Law,¹⁰⁰ to examine and make a written report concerning the sanity of a person detained in prison whom the penal authorities believe to be insane. Or, instead of such commission, the court may order an inquiry by two "qualified physicians." Upon the report, and other evidence, if the court wishes to take it, if the court is satisfied that the defendant is insane, it may commit him to a hospital for mental diseases. This procedure is not mandatory, however.¹⁰¹

In New York, the Code of Criminal Procedure still permits the use of "examiners in lunacy," in cases outside the city of New York. Instead of ordering the defendant examined by hospital psychiatrists, the court may itself make a careful investigation, call two "qualified examiners in lunacy," and the other credible witnesses, invite the district attorney to aid in the examination, and, if he deems it necessary, may call a jury. Within the city of New York, however, the person must be sent to a

¹⁰⁰ Pa. Acts (1923), No. 414, §308, p. 1007.

¹⁰¹ See *ante*, note 86.

hospital, and his mental condition determined by the authorities there.¹⁰² The reason for the distinction is the lack of hospital facilities in other parts of the state.

Another section of the New York Code provides¹⁰³ that if a person pleads not guilty by reason of insanity at the time of the act charged, the court, instead of proceeding with the criminal trial, must appoint a commission of not more than three "disinterested persons" to examine the defendant, and to report to the court. The findings of the commission, it is held, must cover both his sanity or insanity at the time of the act charged, and at the time of the investigation.¹⁰⁴ If he is found to be "insane," the trial must be suspended and the court, "if it deem his discharge dangerous to the public peace or safety," must order that he be committed until he recover.

In Connecticut the court, upon application of the sheriff that a person committed for trial appears to be insane, may hold a hearing, and appoint three reputable physicians to examine as to the defendant's mental condition, and upon their certificate that he is insane, the sheriff shall, "upon the order of the said judge," transfer the person to an insane hospital "until the time of his trial."¹⁰⁵

Power of Commission to Determine Insanity: Louisiana. An ingenious and efficient provision was incorporated in the Louisiana code of criminal procedure, adopted in 1928,¹⁰⁶ which requires that whenever a plea of insanity is made, "either as a defense¹⁰⁷ or as a reason for defendant's not being presently tried," the court is required to notify the parish coroner and the superintendents of the two state insane hospitals, and these three

¹⁰² N.Y. Code of Crim. Proc., §836.

¹⁰³ *Ibid.*, §§658, 659.

¹⁰⁴ *People v. Nyhan* (1918) 171 N.Y. Supp. 466.

¹⁰⁵ Conn. Gen. Stat. (1930), §6431.

¹⁰⁶ La. Code of Crim. Proc., arts. 267-272.

¹⁰⁷ The effect of this statute upon the defense of insanity has already been discussed. See *ante*, p. 260.

form a Commission of Lunacy to inquire into the sanity of the accused. Unlike the commissions provided for in the Pennsylvania, Connecticut, and New York acts, just discussed, this Commission of Lunacy is not merely advisory to the court, but itself decides whether the defendant is insane or not. If the Commission reports him insane, either presently or at the time of the act, the defendant is forthwith confined in an insane institution, and the criminal proceedings are dispensed with. It is only if the commission finds against the defendant's plea of insanity that a judicial hearing is had on the issue. This hearing is had before the court, without a jury, or before a jury of five or twelve, according as the charge in the indictment is triable. If he is here also found sane, he is then tried upon the plea of not guilty.

Lunacy Commission as Jury: Wyoming. Still another device for obtaining the judgment of a lunacy commission upon the question of the defendant's mental condition has been enacted in Wyoming. In that state, the question of the sanity of a person accused or convicted of crime is determined according to the same procedure as that regulating inquisitions of sanity in civil cases. By that procedure, a person alleged to be insane is first examined by the county lunacy commission, consisting of two reputable physicians, one of whom must be a psychiatrist, if possible. As soon as the examination is completed, a hearing is had in open court, at which the lunacy commission sits in lieu of a jury. It is provided, however, that a jury of six laymen may be used, instead of the lunacy commission, "if the court shall consider it advisable, if the alleged insane person or a relative or friend so demands, if the prosecuting attorney so demands, or if the lunacy commission shall fail to make a finding." In such case, "testimony shall be had from at least one physician who is duly qualified to practice medicine in Wyoming, who has examined the alleged insane person."¹⁰⁸

¹⁰⁸ Wyo. Rev. Stat. (1931) §§56-109 to 56-124.

State Boards or Departments to Aid Courts in Insanity Cases.

A recent development is the creation of official agencies to which courts may resort for assistance in determining insanity cases. The Maryland Board of Mental Hygiene and the Massachusetts Department of Mental Diseases are two such agencies. The Maryland law provides that if any person charged with crime shall appear or be alleged to be insane or lunatic, the court may cause the Board of Mental Hygiene to inquire whether such person is at that time insane or lunatic, "or of such mental incapacity as to prevent such from properly conducting his or her defense or advising as to the conduct of his or her defense."¹⁰⁹ If the board finds that the person is so insane or lunatic, or so incapacitated, the court in its discretion shall direct such person to be confined until he recovers, when the trial on the charge pending against him may be resumed.

In Massachusetts, the presiding judge of any court may request the Department of Mental Diseases to assign a member of the medical staff of a state hospital to examine any person coming before the court, to determine his mental condition.¹¹⁰ Delaware in 1929 established a mental hygiene clinic at the state hospital at Farnhurst, with power, among other things, to "observe, examine, study, and treat any person charged with any offense" in any court, when requested to do so by the judge or judges thereof.¹¹¹

Commitment for Observation. In a few states, the court is not only permitted or required to appoint experts to examine the defendant, but also may order him committed to an insane institution for observation. In Massachusetts, the facilities of the state mental hospitals have been available to the courts for this purpose since 1849.

In addition to the section already mentioned, authorizing the

¹⁰⁹ Md. Ann. Code (1924), art. 59, §8.

¹¹⁰ Mass. Gen. Laws (1921), chap. 123, §99.

¹¹¹ Del. Laws, 1929, chap. 241, p. 735.

Massachusetts courts to request the Department of Mental Diseases to assign hospital staff members to examine defendants, it is also provided that if a person under indictment is found by the court, at or before trial, to be insane or "in such a mental condition that his commitment to an institution for the insane is necessary for his proper care or observation pending the determination of his insanity," the court may commit him, "under such limitations as it may order," and may appoint experts in insanity or physicians to examine the defendant.¹¹² The defendant is thus kept under the authority of the court, but is spared the necessity of a court proceeding to determine his mental condition; the examination by the experts is, of course, not a judicial proceeding, and is carried on in the hospital. The Massachusetts act is resorted to extensively by the courts.¹¹³

Maryland has an act very much like this Massachusetts provision, with the exception that the examination of a person whom the court has committed for observation is made not by experts appointed by the court itself, but by the Board of Mental Hygiene.¹¹⁴ In New Hampshire¹¹⁵ and Vermont,¹¹⁶ courts may commit defendants whose sanity is in question to the state hospital, to be observed by the superintendent, until further order of the court. In New York, in all cases arising outside the city of New York, the court "may" and in all cases within New York City the court "shall" order any defendant who appears to be insane to be confined in a local hospital, the authorities of which are required thereupon to examine the defendant and determine his mental condition.¹¹⁷

Perhaps the most detailed of such provisions is that of Wis-

¹¹² Mass. Gen. Laws (1921), chap. 123, §100.

¹¹³ See *post*, Chapter VIII.

¹¹⁴ Md. Ann. Code (1924), art. 59, §10.

¹¹⁵ N.H. Pub. Laws (1926), chap. 11, §13.

¹¹⁶ Vt. Gen. Laws (1917), §2602.

¹¹⁷ N.Y. Code of Crim. Proc. (1928), §836.

consin. The Wisconsin statute provides that the superintendent of the insane hospital to which the defendant is committed shall be directed to permit all experts summoned in the case free access to observe the defendant, and the court may direct the chief physician of the hospital to prepare a report of the defendant's mental condition, which may be introduced in evidence, under oath of the chief physician, who may be cross-examined by both parties regarding the report.¹¹⁸ This procedure is constitutional.¹¹⁹

Inquiry by Court, Jury, or Commission: Kansas. In Kansas, when a person under indictment or information, before or during trial, is found by the court or by commission or another jury impaneled for the purpose of trying such question, to be insane, an idiot, or an imbecile and unable to comprehend his position and to make his defense, the court must commit him to the asylum for the dangerous insane.¹²⁰ When it appears to the court that such person is feeble-minded, the question must be tried in the probate court, by a jury or if a jury is not demanded and the court believes a jury to be inexpedient or improper, a commission of two qualified physicians or one such physician and one clinical psychologist, to make a personal examination of the person and file a report, together with their conclusions and recommendations. The witnesses examined by the commission must be examined under oath, and in the presence of the court.¹²¹

Civil Inquisition of Lunacy not Available to Persons Charged with Crime. Friends or relatives sometimes attempt to forestall prosecution or conviction of a person who has committed an offense, by instituting proceedings in the probate court, or before some other civil tribunal, to have the person adjudged insane. It is held, however, that statutes providing for the com-

¹¹⁸ Wis. Stat. (1931), §357.12 (3).

¹¹⁹ *Jessner v. State* (1930) 202 Wis. 184, 231 N.W. 634.

¹²⁰ Kans. Rev. Stat. (1923), §62-1531.

¹²¹ *Ibid.*, §§39-236, 39-237.

the case as if he had pleaded not guilty.¹²⁹ If the jury found that he stood mute obstinately, he was subjected to the terrible *peine forte et dure*¹³⁰ until he became more reasonable and agreed to plead, or died.

Today, almost without exception, it is provided by statute in the American states that if a defendant refuses to plead, the court may order a plea of not guilty entered for him,¹³¹ and the mere fact that a defendant refuses to plead does not of itself require the question of his physical or mental capacity to be submitted to a jury.¹³² In other words, deafness and dumbness, and possible mental deficiency resulting therefrom, are subject to the same rules as any other form of mental disorder: if a reasonable doubt of the defendant's capacity to plead or conduct a proper defense, because of physical or mental deficiencies, is created in the mind of the judge, either upon his own observation of the prisoner, or upon the suggestion of counsel or other person, that question is to be determined according to the law of the jurisdiction.

A relic of the older rule survives in New Jersey, where it is

¹²⁹ 4 Bl. Comm. 324.

¹³⁰ Described by Hale, 2 P.C. 319 (quoting from Stamford), as follows: "That he be sent to the prison from whence he came, and put into a dark, lower room, and there to be laid naked upon the bare ground upon his back without any clothes or rushes under him or to cover him except his privy members, his legs and arms drawn and extended with cords to the four corners of the room, and upon his body laid as great a weight of iron as he can bear, and more. And the first day he shall have three morsels of barley bread without drink, the second day he shall have three draughts of water, of standing water next the door of the prison, without bread, and this to be his diet till he die." And see 4 Bl. Comm. 327.

¹³¹ In the federal courts it has been held that the court has this power even in the absence of statutory authority. *U.S. v. Borger* (1881) 19 Blatchf. 249, 7 Fed. 193.

¹³² However, where it appears that the defendant is deaf and dumb, and for this reason incapable of pleading or of understanding the nature and incidents of a trial, the court should not enter a plea of not guilty for him, but should determine the question of his mental and physical

provided by the statute¹³³ that if a defendant "stand mute," a jury must be impaneled to try whether he does so by act of God or obstinately and on purpose. If found to be standing mute by act of God, the court must cause him to be kept in jail until he recovers, but if found to be standing mute obstinately, the court must cause a plea of not guilty to be entered for him. And the court shall also cause a plea of not guilty to be entered where any person shall "refuse" to plead or answer the indictment.

This statute was evidently taken from the English act 7 & 8 Geo. IV, chap. xxviii. The distinction which it attempts to draw between the case of a defendant "standing mute" (in which event a jury trial is required), and one "refusing" to plead (whereupon a plea of not guilty is simply entered for him), is not always easy to apply,¹³⁴ although it is a distinction which all the common law writers made.¹³⁵ A second criticism is that by this act New Jersey preserves the barbaric practice of the dark ages by which a person born deaf and dumb, or a congenital idiot incapable of making a plea, is kept in jail "until he shall have recovered"—a contingency which, in most such cases, is hopelessly out of the question.

Sanity Inquiry When Defendant Pleads Guilty. In Texas, any capacity, and if found to be incapable of pleading or conducting a defense, he should not be tried. *State v. Harris* (1860) 8 Jones Law (N.C.) 136, 78 Am. Dec. 272.

¹³³ N.J. Comp. Stat. (1911), p. 1839, §58.

¹³⁴ See, for example, *State v. Noel* (1926) 102 N.J.L. 659, 689 *et seq.*, 133 Atl. 274, where on the indictment's being read to defendant he was asked, "How do you plead?" The Court: "The defendant does not answer. A plea of not guilty will be entered." A majority of the judges held that the court by this action had not "usurped the province of a jury by deciding that the defendant's mutism was a refusal to answer."

¹³⁵ It would seem that "standing mute" consists in saying absolutely nothing, so as to raise a question whether the defendant is capable of speech; while a "refusal" refers to the case of a defendant who is clearly able to speak, but who will not answer to the indictment, or who answers only ineffectually or impertinently. 2 Hawkins P.C. 327.

person who pleads guilty to a charge of crime is *prima facie* presumed to be out of his mind, and the court before accepting such a plea, must satisfy itself that the person adopting this strange and unusual course of action is sane. The Texas statute¹³⁶ requires that before a plea of guilty is accepted it must "plainly appear" that the defendant is sane, and is uninfluenced by fear, persuasion, or delusive hope of pardon. It is presumed, the Texas courts have held, that a person making such a plea is insane and the burden is on the state to prove him sane.¹³⁷ "The theory of the law," the court has said, "is that no citizen in his right mind would plead guilty to crime."¹³⁸

The question of such a defendant's sanity is addressed to the trial judge alone, it is not a question for a jury.¹³⁹ Also, the question relates solely to the defendant's sanity at the time of making the plea, and not at the time of the act charged as criminal.¹⁴⁰ The judgment in such a case must always show affirmatively that the trial court has passed on this question, and found the defendant sane, as a prerequisite to accepting the plea of guilty.¹⁴¹

This theory, that pleading guilty to a charge of crime is presumptive evidence of insanity, has not been accepted in any

¹³⁶ Tex. Complete Stat. (1928), Code of Crim. Proc., art. 501.

¹³⁷ *Sanders v. State* (1885) 18 Tex. App. 372; *Burton v. State* (1894) 33 Tex. Crim. 138, 25 S.W. 782; *Harris v. State* (1915) 76 Tex. Crim. 126, 172 S.W. 975; *Spero and Sicola v. State* (1928) 109 Tex. Crim. 392, 5 S.W. (2d) 145.

¹³⁸ *Harris v. State*, *supra*.

¹³⁹ *Taylor v. State* (1921) 88 Tex. Crim. 470, 227 S.W. 679.

¹⁴⁰ *Ibid*.

¹⁴¹ *Saunders v. State* (1881) 10 Tex. App. 336; *Wallace v. State* (1881) 10 Tex. App. 407; *Frosh v. State* (1881) 11 Tex. Crim. 280; *Evers v. State* (1893) 32 Tex. Crim. 283, 22 S.W. 1019; *Coleman v. State* (1896) 35 Tex. Crim. 404, 33 S.W. 1083; *Taylor v. State*, *supra*. However, the court, it seems, may determine that the defendant is sane, without hearing testimony on the question. *Zepeda v. State* (1928) 110 Tex. Crim. 57, 7 S.W. (2d) 527.

other state. It is the general rule, however, if it appears that a defendant was insane at the time of pleading guilty, the court may permit the plea to be withdrawn, and refusal to do so may constitute reversible error.¹⁴²

The Texas code also provides that where the punishment for a crime is not absolutely fixed by statute, if a defendant pleads guilty, a jury must be impaneled to determine the punishment. If the jury is of the opinion that the defendant is insane, it should so report to the court, and the issue must thereupon be submitted to another jury to determine. If the jury finds him insane, further proceedings in the case against him must be suspended until he becomes sane.¹⁴³

The Ohio Code of Criminal Procedure contains an enlightened provision that the court, in fixing sentence after conviction or plea of guilty, may hear testimony in mitigation, and may direct the probation officers "to make such inquiries and reports as the court may require concerning the defendant," and may "appoint not to exceed two psychologists or psychiatrists who shall make such report or reports concerning the defendant as the court may require for the purpose of determining the disposition of the case." Such psychologists or psychiatrists are to be paid fees fixed by the court, and shall make their reports in writing in the open court. A copy of the report is to be furnished the defendant who has the right to examine the witnesses, under oath.¹⁴⁴

Sanity Inquiry upon Discharge for Want of Prosecution. One state, Pennsylvania, even makes special provision for the case where a person charged with crime appears to be insane when brought up to be discharged for want of prosecution. When, on such occasion, the defendant shall by the oath or affirmation of one or more credible persons appear to be insane, the court

¹⁴² Cassidy v. State (1930) 201 Ind. 311, 168 N.E. 18.

¹⁴³ Tex. Complete Stat. (1928), Code of Crim. Proc., art. 701.

¹⁴⁴ Ohio Ann. Code (1930), §13451-2.

must order the district attorney to send an allegation to that effect before the grand jury, in the nature of a bill of indictment. The grand jury must inquire into the case and present their findings to the court, "and thereupon the court shall order a jury to be impanelled to try the insanity of such person," notice of the trial being given to the next of kin.¹⁴⁵

When Question of Present Insanity Arises During Trial. Most of the statutes we have been discussing apply not only where the issue of present insanity arises before trial, or at the time of arraignment, but also at any time during trial, up to the time for judgment. In a few states, the statutes refer only to the situation where the question is raised "before trial,"¹⁴⁶ but it has been held that in the absence of statutory provision, the court may stop a trial, if it entertains a doubt of the defendant's capacity to conduct a rational defense, and first pass upon that question.¹⁴⁷ The Georgia statute provides for a special plea of insanity, but it seems the question may be raised after the pleadings are in.¹⁴⁸

Where the allegation that the defendant is presently insane is made for the first time after all the evidence has been put in, it has been held proper for the court to refuse to take the case out of the jury's hands, but to allow the trial to proceed, reserving action on the question of the present insanity until after the verdict has been received.¹⁴⁹

¹⁴⁵ Pa. Stat. (1920), §14447.

¹⁴⁶ Conn. Gen. Stat. (1930), §6431; Mo. Rev. Stat. (1929), §3657. The Rhode Island act, R.I. Gen. Laws (1923), §1617, refers only to persons "awaiting trial or imprisoned"; and the Virginia statute, Va. Code (1930), §4909, only to the case where the question arises "prior to the time for trial" or "at the time at which . . . he would be tried."

¹⁴⁷ *Youtsey v. U.S.* (1899) 97 Fed. 937; *State v. Brotherton* (1930) 131 Kans. 295, 291 Pac. 954; *State v. Reed* (1889) 41 La. Ann. 581, 7 So. 132; *Evans v. State* (1930) 123 Ohio 132, 174 N.E. 348.

¹⁴⁸ *Baughn v. State* (1897) 100 Ga. 554, 28 S.E. 68, 38 L.R.A. 577.

¹⁴⁹ *State v. Cropper* (1923) 153 La. 545, 96 So. 116; *State v. Genna* (1927) 163 La. 701, 112 So. 655.

Trial of Present Insanity Together with Issue of Guilt or Innocence. At common law, it seems that the trial court had the discretion, if the question of present insanity was not raised until after the criminal trial had begun, to submit this question to the same jury, along with the issue of guilt or innocence, instead of suspending the criminal trial in order to hold a separate inquiry on the insanity issue.¹⁵⁰ This procedure is still permitted in two or three jurisdictions. The New Mexico court has held¹⁵¹ such procedure is authorized by the statute of that state, which says that "if upon the trial of any person so indicted, such person shall appear to the jury charged with such indictment to be a lunatic," the court may order him kept in strict custody so long as he remain of unsound mind.¹⁵² Under the Colorado statute if a defendant pleads "not guilty by reason of insanity since the time of the alleged commission of the crime," that issue is tried alone, but if he pleads "not guilty by reason of insanity at the time of the alleged commission of the crime and since," it seems the court may try the defendant on the main case.¹⁵³ A similar rule obtains in Missouri.¹⁵⁴ In the federal courts, also, it has been held that "if present insanity does not appear until the trial has begun, the court may submit the objection to the jury along with the principal issue, requiring a special verdict as to the competency of the defendant to understand the proceeding and intelligently defend himself."¹⁵⁵

The practice is also permitted in Pennsylvania,¹⁵⁶ North Caro-

¹⁵⁰ Reg. v. Berry (1876) 1 Q.B. Div. 447; Bishop, *New Crim. Proc.* (2d ed., 1913), vol. iii, §666, p. 1641.

¹⁵¹ Terr. v. Kennedy (1910) 15 N. Mex. 556, 110 Pac. 854.

¹⁵² New Mex. Stat. Ann. (1929), §105-2227.

¹⁵³ Colo. Laws, 1927, chap. 90.

¹⁵⁴ State v. Church (1906) 199 Mo. 605, 98 S.W. 16; State v. Crane (1906) 202 Mo. 54, 100 S.W. 422.

¹⁵⁵ Youtsey v. U.S. (1899) 97 Fed. 937; U.S. v. German (1902) 115 Fed. 987.

¹⁵⁶ Pa. Stat. (1920), §14446; Taylor v. Comm. (1885) 109 Pa. 262;

lina,¹⁵⁷ and perhaps Kentucky,¹⁵⁸ even where the defendant's present insanity is suggested before the trial has begun, although the North Carolina court has disapproved of it.¹⁵⁹ It was formerly permitted also in Louisiana and Texas,¹⁶⁰ but the courts of these states have more recently held it to constitute reversible error.¹⁶¹ Thus in Texas it has been held that such a procedure is not only contrary to the statutory provision that no person who is insane shall be tried for crime, but that "it would be manifestly confusing to the jury and unfair to the accused. If he be now insane, the fair decision of that issue should not be clouded and prejudiced by the introduction of the facts involving a blood-curdling murder—facts which alone might well so stir the minds of the jury as to make difficult the exercise of calm judgment upon the question of present insanity."¹⁶²

Webber v. Comm. (1888) 119 Pa. 223, 13 Atl. 427; *Comm. v. Endrukut* (1911) 231 Pa. 529, 80 Atl. 1049; *Comm. v. Scovern* (1928) 292 Pa. 26, 140 Atl. 611; *Comm. v. Cilione* (1928) 293 Pa. 208, 216, 142 Atl. 216.

¹⁵⁷ *State v. Haywood* (1886) 94 N.C. 847; *State v. Khoury* (1908) 149 N.C. 454, 62 S.E. 638; *State v. Sandlin* (1911) 156 N.C. 624, 72 S.E. 203.

¹⁵⁸ *Davidson v. Comm.* (1916) 171 Ky. 488, 188 S.W. 631. The defendant in this case had been found presently insane at an inquest held before trial, and was committed for seven months. It does not appear how he was discharged, but in the next year, his case was assigned for trial. At the time for this trial, defendant moved for another inquest to determine his present mental condition, which was refused. The trial court submitted the question of present insanity to the jury trying him for crime and the Kentucky Court of Appeals held that "it cannot be said the court abused a sound discretion in overruling the motion for an inquest."

¹⁵⁹ *State v. Haywood*, *supra*.

¹⁶⁰ *State v. Reed* (1889) 41 La. Ann. 581, 7 So. 132; *State v. Douglas* (1906) 116 La. 526, 40 So. 860; *State v. Charles* (1909) 124 La. 744, 50 So. 699; *Chase v. State* (1900) 41 Tex. Crim. 560, 55 S.W. 833; *Lermo v. State* (1902) 68 S.W. 684.

¹⁶¹ *State v. McIntosh* (1915) 136 La. 1000, 68 So. 104; *State v. Cropper* (1923) 153 La. 545, 96 So. 116; *Guagando v. State* (1874) 41 Tex. 626; *Witty v. State* (1913) 69 Tex. Crim. 125, 131, 153 S.W. 1146; *Ramirez v. State* (1922) 92 Tex. Crim. 38, 241 S.W. 1020; *Soderman v. State* (1924) 97 Tex. Crim. 23, 260 S.W. 607.

¹⁶² *Ramirez v. State*, *supra*.

Place of Confinement. The statutes generally provide that if a person is found to be so insane as to be unfit to plead or be tried, he shall be committed to a state hospital for the insane until he recovers. At common law, the practice seems to have been to confine such person in jail,¹⁰³ and it has been held that in the absence of statutes, even today, the court only has power to order such person confined in jail.¹⁰⁴ In West Virginia, the statute expressly provides that if a defendant is found to be insane, the court may commit him to jail, or order him confined in the state hospital, until he is so restored that he can be put on trial.¹⁰⁵

Procedure on Recovery. When a person whose trial was suspended because of insanity recovers, he must be returned from the hospital or insane ward to penal custody, in order that criminal proceedings may be resumed against him. The determination that the accused has recovered his sanity is usually left in the first instance to the superintendent of the hospital where he is confined.¹⁰⁶ Where statutes specifically set forth the procedure to be followed in such cases, it is usually provided that when the defendant becomes sane, the superintendent must

¹⁰³ *Comm. v. Hathaway* (1816) 13 Mass. 298; Archbold, *Crim. Pl., Evid. & Prac.* (26th ed., 1922), p. 172.

¹⁰⁴ *U.S. v. Lawrence* (1835) 4 Cranch C.C. 514, 26 Fed. Cas. No. 15,576; *Hawie v. Hawie* (1922) 128 Miss. 473, 91 So. 131.

¹⁰⁵ W. Va. Off. Code (1931), §62-3-9.

¹⁰⁶ This is true under the statutes of Alabama, Arizona, Arkansas, California, District of Columbia, Idaho, Illinois, Indiana, Iowa, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Tennessee, Utah, Virginia, West Virginia, and Wisconsin. For citations to statutes, see below, notes 167 to 174. In Massachusetts, a person found insane during trial and committed cannot be discharged except upon the certificate of the superintendent and the trustees of the hospital, or where the defendant is committed to the hospital for criminal insane, the commissioner of correction and the superintendent of the state farm. Mass. Gen. Laws (1921), chap. 123, §105, as amended, Acts, 1923, chap. 467, §4. In Nebraska a patient who is under charge or conviction of homicide cannot be discharged without the order of the board of public lands and buildings. Neb. Comp. Stat. (1929), §83-729.

notify the sheriff,¹⁶⁷ or the sheriff and prosecuting attorney,¹⁶⁸ or the sheriff and judge,¹⁶⁹ or the court,¹⁷⁰ or the clerk of the court,¹⁷¹ or the judge and the state's attorney;¹⁷² and thereupon the person must be removed from the hospital to penal custody, until criminal proceedings are resumed.

Under most of these statutes, it seems that the notice or certificate of the superintendent that such person is no longer insane is sufficient to settle that fact, and the person is thereupon returned to prison and placed on trial without further ado. In some jurisdictions, however, it has been held that the superintendent's certificate is not conclusive, and that while the courts

¹⁶⁷ Ark. Dig. Stat. (Crawford & Moses, 1921), §9416; Utah Comp. Laws (1917), §9334; Iowa Code (1931), §§3509, 3510 (§3511 adds that no person under a criminal charge or conviction shall be discharged without order of the district court or notice to the prosecuting attorney of the proper county).

¹⁶⁸ Ariz. Rev. Code (1928), §5200; Cal. Penal Code (1931), §1372; Idaho Comp. Stat. (1919), §9171; Mont. Rev. Codes (1921), §12218; Nev. Comp. Laws (1929), §11188; N. Dak. Comp. Laws (1913), §11070.

¹⁶⁹ Ala. Code (1928), Crim. Code, §§4575, 4577.

¹⁷⁰ D.C. Code (1929), Title 6, §376; Ind. Ann. Stat. (Burns, 1926), §§2295, 2345; Ky. Stat. (1930), §216-aa-98; N.J. Laws (1918), chap. 147, §437, N.J. Comp. Stat. (Cum. Supp., 1911-1924), §34-188; N.Y. Code of Crim. Proc. (1928), §661 (but compare §836, requiring the superintendent to notify the trial judge and the district in cases outside New York City); Wis. Stat. (1931), §357.13(3). In New Mexico, the superintendent is required to examine all inmates monthly and report the names of those recovered to the proper court. N. Mex. Stat. Ann. (1929), §130-806.

¹⁷¹ N.C. Code (1930), §6240; Tenn. Code (1932), §4475; Va. Code (1930), §§1045, 4911; W. Va. Off. Code (1931), §§27-4-7, 27-4-8.

¹⁷² Mich. Comp. Laws (1929), §17241, as amended, Pub. Acts, 1931, No. 317, p. 531. In Illinois, it is provided in one section of the statutes that when a person sent to the hospital as insane, being under indictment for crime, is discharged by the superintendent, the latter must notify the state's attorney. Ill. Rev. Stat. (Smith-Hurd, 1931), chap. 85, par. 38. Another section provides that no patient charged with crime shall be declared discharged until at least ten days after notice to the judge of the county court having jurisdiction in the case, to enable the judge to make some proper order for the disposition of the patient. *Ibid.*, par. 22.

will ordinarily respect the judgment of the asylum authorities, yet the question of the sanity or insanity of a person charged with crime is ultimately for the trial court, and if there is any doubt whether the person is still insane, even though the hospital authorities have certified that he is sane, the court may exercise its authority by a proper inquiry.¹⁷³

The provision of such statutes, that upon recovery the superintendent is to notify certain officials, is not exclusive, and does not prevent a court from inquiring into the question without such notice from the superintendent,¹⁷⁴ and does not prevent the person himself or his friends from instituting judicial proceedings by *habeas corpus*, where the superintendent fails or refuses to act.¹⁷⁵

§4. PRESENT INSANITY AFTER VERDICT OF GUILTY

Common Law Still in Effect. After a verdict of guilty and before sentence is pronounced, if a defendant is found to be incapable of comprehending the nature and purpose of the proceedings or of stating any reasons that may exist why sentence should not be pronounced, sentence should be stayed and the defendant committed as an insane person until he recovers.¹⁷⁶

¹⁷³ *State v. Pritchett* (1890) 106 N.C. 667, 11 S.E. 357. The Kentucky statute specifically states that: "The certificate of the superintendent of a state institution for persons of unsound mind shall be prima facie evidence that a person of unsound mind has been restored upon an inquest for restoration provided the inquest is commenced within ten days from the date of the certificate." Ky. Stat. (Carroll, 1930), §216-aa-98.

¹⁷⁴ *State v. Pritchett, supra*. This is expressly provided in the statutes of some states: Ind. Ann. Stat. (Burns, 1926), §§2295, 2345 (when defendant becomes sane, superintendent shall notify court, or the court may act in the first instance, whenever he receives information of defendant's restoration to sanity); Va. Code (1930), §§1045, 4911 (permitting jury trial, if defendant elects); W. Va. Off. Code (1931), §27-4-7.

¹⁷⁵ *Gardner v. Jones* (1899) 126 Cal. 614, 59 Pac. 126; *Wagner v. White* (1912) 38 App. D.C. 554; *Parker v. Bernstein* (1925) 125 Misc. 92, 210 N.Y. Supp. 594.

¹⁷⁶ *State v. Brinyea* (1843) 5 Ala. 241; *People v. Pico* (1882) 62 Cal. 50;

This was the rule at common law,¹⁷⁷ and is still universally true (except perhaps in Georgia).¹⁷⁸ Statutes have been enacted in more than half of the states,¹⁷⁹ setting forth the procedure to be followed in such cases, but they have not altered the substantive rule.

The test, as has already been said,¹⁸⁰ when the question is raised at this stage of the proceedings, is whether the defendant has sufficient intelligence to comprehend the nature and purpose of the proceedings and to convey any reasons that may exist why judgment should not be pronounced against him. In five states,¹⁸¹ the statutes refer only to the case where, after verdict, the defendant "becomes" insane, and in a few states even where the statute does not use this phrase, the courts have held that to require suspension of the judgment, it must be shown that the defendant has become insane, and the mere allegation that he is insane is not sufficient.¹⁸² This requirement that the defendant must have become insane has already been discussed.¹⁸³

The burden of proof, in most jurisdictions, is upon the defendant, to establish the existence of such mental incapacity by a preponderance of the evidence.¹⁸⁴

Method of Determining Mental Condition. At common law

State v. Vann (1881) 84 N.C. 722; *Bonds v. State* (1827) 8 Tenn. (M. & Y.) 143; *State v. Nordstrom* (1899) 21 Wash. 403, 58 Pac. 248; *Crocker v. State* (1884) 60 Wis. 553, 19 N.W. 435.

¹⁷⁷ 1 Hale P.C. 35; 4 Bl. Comm. 24, 396.

¹⁷⁸ *Baughn v. State* (1897) 100 Ga. 554, 28 S.E. 68, 38 L.R.A. 577 (*dictum*).

¹⁷⁹ See pp. 379-380.

¹⁸⁰ See *ante*, pp. 335-336.

¹⁸¹ *Colorado*: Comp. Laws (1921), §6639; *Delaware*: Rev. Code (1915), §2607; *Illinois*: Rev. Stat. (Smith-Hurd, 1931), chap. 38, par. 593; *Nebraska*: Comp. Stat. (1929), §29-1821; *Texas*: Complete Stat. (1928), Code of Crim. Proc., art. 921, as amended, Gen. Laws, 1931, chap. 54, p. 82; *Springer v. State* (1911) 63 Tex. Crim. 266, 140 S.W. 99.

¹⁸² *Brinyea v. State* (1843) 5 Ala. 241; *State v. Patton* (1857) 12 La. Ann. 288; *State ex rel. Paine v. Potts* (1897) 49 La. Ann. 1500, 22 So. 738; *Lewis v. State* (1930) 155 Miss. 810, 125 So. 419.

¹⁸³ *Ante*, pp. 336-339.

¹⁸⁴ See *ante*, p. 339.

the trial judge, when a reasonable doubt of the defendant's mental capacity is raised, may decide the question in any judicial manner he sees fit, either with or without the aid of a jury.¹⁸⁵ Where the matter is regulated by statute, however, the effect is generally to require the question to be determined according to a specific procedure, usually by a jury trial. The methods of trying the issue in the various states may be summed up as follows:

In twenty states, there are no statutes,¹⁸⁶ and the common-law rule therefore seems to control, i.e., when a reasonable doubt of the defendant's mental capacity is raised, it is in the court's discretion to decide the method by which the issue should be tried, whether upon investigation by the judge himself, or by a jury trial.¹⁸⁷

In four states the court is granted this discretion by statute.¹⁸⁸

¹⁸⁵ *State v. Lyons* (1904) 113 La. 959, 37 So. 890. And cases cited, p. 334. If the application does not show sufficient facts to create a reasonable doubt, no inquiry need be granted. *Comm. v. Buccieri* (1893) 153 Pa. 535, 26 Atl. 228; *Comm. v. Schmous* (1894) 162 Pa. 326, 29 Atl. 644.

¹⁸⁶ Alabama, Connecticut, Florida, Georgia, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Washington. The Pennsylvania Mental Health Act, Laws, 1923, No. 414, §308, provides for an inquiry of a defendant's sanity who appears or is alleged to be insane when charged with crime, or "on the production or appearance before the court of such a person under any other circumstances." This may perhaps cover the situation where the defendant is brought before the court for sentence.

¹⁸⁷ *Williams v. State* (1903) 45 Fla. 128, 34 So. 279; *Hawie v. State* (1919) 121 Miss. 197, 216, 83 So. 158; *State v. Bethune* (1911) 88 S.C. 401, 408, 71 S.E. 29; *Jordan v. State* (1910) 124 Tenn. 81, 135 S.W. 327, 34 L.R.A. (N.S.) 1115; *State v. Nordstrom* (1899) 21 Wash. 403, 58 Pac. 248.

¹⁸⁸ *Louisiana*: Ann. Rev. Stat. (Marr, 1915), §3471 (if a defendant "is found to be insane," the court shall order him committed). The method of trying the issue is in the discretion of the trial court. *State v. Lyons* (1904) 113 La. 959, 37 So. 890. This provision has perhaps been impliedly repealed by §§267 and 268 of the Code of Criminal Procedure of 1928; *New York*: Code of Crim. Proc. (1928), §§481, 836; *Ohio*: Ann. Code (1930), §13441-1; *Wisconsin*: Stat. (1931), §357.13(1).

In twenty-one other jurisdictions, statutes require that when a doubt is raised, a jury trial be had.¹⁸⁹ In accordance with the rule in cases where the question is raised before or during trial,¹⁹⁰ it has been held that a refusal to grant a jury trial, where the court had the opportunity to observe the defendant, is not erroneous,¹⁹¹ and in determining whether to impanel a jury, the court may make a preliminary investigation and appoint experts to examine the accused.¹⁹²

In three states, the statutes seem to contemplate an investigation by the court itself, without a jury.¹⁹³

In Delaware, the court in capital cases may appoint a commission, which decides the question of the defendant's sanity or insanity.¹⁹⁴

In states where the matter is regulated by statute, the procedure for adjudicating the question after verdict is usually the

¹⁸⁹ *Arizona*: Rev. Code (1928), §5197; *Arkansas*: Dig. Stat. (Crawford & Moses, 1921), §3237; *California*: Penal Code (1931), §§1191, 1201, 1368; *Colorado*: Comp. Laws (1921), §6639; *District of Columbia*: Code (1929), Title 6, §374; *Idaho*: Comp. Stat. (1919), §§9167, 9033; *Illinois*: Rev. Stat. (Smith-Hurd, 1931), chap. 38, par. 593; *Indiana*: Ann. Stat. (Burns, 1926), §2344; *Iowa*: Code (1931), §13905; *Kentucky*: Codes (Carroll, 1927), Crim. Code of Prac., §287; *Montana*: Rev. Codes (1921), §12065, 12214; *Nebraska*: Comp. Stat. (1929), §29-1821; *Nevada*: Comp. Laws (1929), §§11184, 11050; *North Dakota*: Comp. Laws (1913), §11064; *Oklahoma*: Comp. Stat. (1931), §§3212, 3135; *South Dakota*: Comp. Laws (1929), §§4793, 4957; *Texas*: Complete Stat. (1928), Code of Crim. Proc., arts. 773, 921, as amended, Gen. Laws (1931), chap. 54, p. 82; *Utah*: Comp. Laws (1917), §§9328, 9050; *Virginia*: Code (1930), §4910; *West Virginia*: Off. Code (1931), §62-3-10; *Wyoming*: Rev. Stat. (1931), §§56-111 to 56-113 (trial by jury of six men). The Iowa act, *supra*, merely provides for "a trial," but it seems that a jury trial is contemplated, and is had in practice.

¹⁹⁰ See *ante*, p. 356.

¹⁹¹ *People v. Keaton* (1931) 211 Cal. 722, 296 Pac. 609.

¹⁹² *People v. Northcott* (1930) 209 Cal. 639, 289 Pac. 634.

¹⁹³ *Maine*: Rev. Stat. (1930), chap. 149, §14; *Massachusetts*: Gen. Laws (1921), chap. 123, §100; *North Carolina*: Code (1931), §6237.

¹⁹⁴ *Del. Rev. Code* (1915), §2607.

same as where it arises before or during the trial. In fact, the two situations are usually dealt with in one section.¹⁹⁵ In a few states, the two situations are dealt with in separate sections of the statutes,¹⁹⁶ and in some, the procedure in the two cases is not the same.¹⁹⁷

Where a judicial hearing is had, it has been held that on a finding that the defendant has become insane since the time of conviction, the court can grant a new trial on motion of the prosecution.¹⁹⁸

Procedure on Recovery. The rules concerning the recovery of persons who were found insane at the time for sentence and committed to an insane institution, are practically the same as when the defendant is found insane before or during trial.¹⁹⁹ The statutory method of determining recovery and the procedure thereupon are in most states the same in the two situa-

¹⁹⁵ Arizona, California, Colorado, District of Columbia, Illinois, Iowa, Louisiana, Massachusetts, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Wisconsin, and Wyoming. See statutes cited above.

¹⁹⁶ *Arkansas*: Dig. Stat. (Crawford & Moses, 1921), §§3055, 3257; *Indiana*: Ann. Stat. (Burns, 1926), §§2295, 2344; *Maine*: Rev. Stat. (1930), chap. 149, §§10, 14; *Virginia*: Code (1930), §§4909, 4910; *West Virginia*: Off. Code (1931), §§62-3-9, 62-3-10. Delaware and Texas, while having statutes covering the procedure after conviction, have no statutory provision for the case where the question arises before or during trial.

¹⁹⁷ In Indiana, when the question arises before or during trial, the court itself decides the issue. Ind. Ann. Stat. (Burns, 1926), §2296. When it arises at the time for judgment, it must be decided by a jury. *Ibid.*, §2344. In Virginia, if a doubt arises prior to the time for trial, the court itself hears evidence and may order the defendant committed for observation, and/or appoint a commission of physicians to examine him. When the question arises at the time for trial, the same procedure may be followed, or a jury impaneled. Va. Code (1930), §4909. After conviction and before sentence, a jury trial seems to be the only method of trying the issue provided. *Ibid.*, §4910.

¹⁹⁸ *People v. Preston* (1931) 345 Ill. 11, 177 N.E. 761.

¹⁹⁹ See *ante*, p. 375.

tions; i.e., when the superintendent certifies that the person is no longer insane, or when the court in any other way is informed of this fact, the person is conveyed from the hospital and sentence is passed upon him.

Only a few states have special provisions concerning the recovery of persons found insane at the time for sentence. In Delaware in capital cases, when a prisoner is found insane at such time, and is thereupon committed, the court trying the prisoner adjourns from term to term until sentence can properly be passed. "Whether he has so recovered his reason may be established to the court by any evidence it may choose to consider for that purpose, and need not be by commission."²⁰⁰ In Georgia,²⁰¹ it is provided that if sentence is suspended on the ground of insanity, upon recovery the superintendent is to certify the fact to the presiding judge of the court where the person was convicted.²⁰² Under the Texas law, when the court is informed by the official certificate of the superintendent, or, if the defendant is not confined in an asylum, by the affidavit of any credible person, that the defendant has become sane, a jury trial is required to try the issue of his sanity.²⁰³

Feeble-mindedness and Epilepsy Preventing Trial or Judgment. In a few states, the statutes provide expressly for cases of feeble-mindedness, as well as for "insanity" and "lunacy" in general, as grounds for staying criminal proceedings. We have already called attention to the fact that in Kansas, if a person charged with crime appears to the court to be feeble-minded, he must be remanded to the probate court.²⁰⁴ In Illinois, Iowa, and Oregon, if on conviction, the court has reason to believe the defendant is feeble-minded, proceedings may be instituted for his

²⁰⁰ Del. Rev. Code (1915), §2607.

²⁰¹ Ga. Code (1926), Penal Code, §977.

²⁰² A similar provision exists in North Carolina: N.C. Code (1930), §6239. And see Ky. Codes (Carroll, 1927), Crim. Code of Prac., §287.

²⁰³ Tex. Complete Stat. (1928), Code of Crim. Proc., arts. 928-932.

²⁰⁴ See *ante*, p. 365.

commitment as a feeble-minded person.²⁰⁵ The Illinois and Iowa provisions extend also to feeble-minded children brought before a juvenile court. In Virginia and Wisconsin, the statutes providing for the procedure to be followed in cases where the defendant appears or is alleged to be insane at the time of the trial include feeble-mindedness as well as insanity,²⁰⁶ and the New Jersey law includes also epilepsy.²⁰⁷

Mental Defect or Defective Delinquency. In recent years, a growing number of the more progressive state legislatures, following in the wake of advancing psychiatric learning, have realized that there are individuals who are not of sufficiently low mentality to be called legally irresponsible for their antisocial acts, or incapable of standing trial, but who are, nevertheless, of more or less subnormal mentality, and who require special institutional treatment. The first state to recognize such a group legally was Massachusetts, in 1911,²⁰⁸ and the first institution for their separate confinement and care was established at Napanoch, New York, in 1921.²⁰⁹

The Massachusetts law provides that in any case involving an offense not punishable by death or life imprisonment, if the court shall find that the defendant is mentally defective and has shown himself to be an habitual delinquent or shows tendencies towards becoming such, and that such delinquency is or may become a menace to the public and that he is not a proper subject for commitment as an insane or feeble-minded person, the court may commit him as a defective delinquent.²¹⁰

²⁰⁵ Ill. Rev. Stat. (Smith-Hurd, 1931), chap. 23, par. 366, Iowa Code (1931), §§3454, 3455; Ore. Code (1930), §67-1702.

²⁰⁶ Va. Code (1930), §4909; Wis. Stat. (1931), §357.13(1).

²⁰⁷ N.J. Laws, 1918, chap. 147, §437, N.J. Comp. Stat. (Cum. Supp., 1911-1924), §34-188.

²⁰⁸ Mass. Acts, 1911, chap. 595, §1.

²⁰⁹ N.Y. Laws, 1921, chap. 483, p. 1495.

²¹⁰ Mass. Gen. Laws (1921), chap. 123, §113, as amended, Acts, 1928, chap. 333, §115.

The New York Mental Hygiene Law²¹¹ provides that any person alleged to be "mentally defective"²¹² arraigned on a criminal charge may be committed before or after trial or conviction²¹³ to a proper hospital for a period not to exceed ten days, for examination as to his mental and physical condition. If the examiners find that he requires supervision, control, and care, the judge must issue an order accordingly.²¹⁴

In Pennsylvania the courts are authorized to commit to an institution for mental defectives any person charged with or convicted of crime (except persons convicted of first-degree murder) who is found on examination to be mentally defective.²¹⁵ In Tennessee, the court may hold an inquest whenever it has reason to feel that a person charged with crime (other than mur-

²¹¹ N.Y. Consol. Laws (Cahill, 1930), chap. 36-a, §§125, 126.

²¹² "Mental defective" is defined in section 2 of the act to mean "any person afflicted with mental defectiveness from birth or from an early age to such an extent that he is incapable of managing himself and his affairs, who for his own welfare or the welfare of others or of the community requires supervision, control, or care and who is not insane or of unsound mind to such an extent as to require his commitment to an institution for the insane as provided in this chapter."

²¹³ In providing for commitment of a person alleged to be mentally defective "*before* or *after*" trial or conviction, the law seems to conflict with section 836 of the Code of Criminal Procedure, providing for commitment before trial if the defendant lacks the capacity to understand the nature of the charge and to conduct his defense. The court has tried to reconcile the two sections by holding that they should be read together, and that the commitment provided in section 125 of the Mental Hygiene Law "should not be made until *after* the trial on the criminal charge, unless the mental defect is such as to make it appear that the accused has not the ability of mind to understand the nature of the crime charged, and to properly consult and advise with counsel." *People v. Thayer* (1923) 121 N.Y. Misc. 745, 202 N.Y. Supp. 633.

²¹⁴ But the alleged mental defective is entitled to notice and hearing as provided in the law. *Parker v. Bernstein* (1925) 125 Misc. 92, 210 N.Y. Supp. 594.

²¹⁵ Pa. Laws, 1923, No. 414, §311b, as amended, Pa. Laws, 1927, No. 281, p. 431, Pa. Stat. (Cum. Supp., 1928), §14726a-311b.

der or rape) is feeble-minded.²¹⁶ The Georgia statute permits the court to order commitment for mental deficiency only in misdemeanor cases.²¹⁷

Virginia provides for the commitment to a prison farm for defective misdemeanants of any person convicted of misdemeanor, who has previously been convicted of misdemeanor three or more times, and who is found to be "mentally deficient and unable to control his or her behavior."²¹⁸

All of these legislative attempts to cope with the problem of mental deficiency as a crime factor may well be worth careful study, especially with a view to finding the actual social effects of the legal provisions. The importance of mental deficiency as a cause of crime has not been even approximately determined.²¹⁹

§5. PRESENT INSANITY AFTER SENTENCE

Insane Person not to be Executed. "If a man commit treason or felony," says Coke, "and if after judgment he become de non sane memorie, he shall not be executed, for it cannot be an example to others."²²⁰ This general rule holds true today. Perhaps the majority of authorities still follow Coke's form of stating the rule, that if a person become insane after judgment, he shall not be executed, etc.,²²¹ although, as has been pointed out in previous

²¹⁶ Tenn. Code (1932), §4519.

²¹⁷ Ga. Code (1926), Pol. Code, §1614 (5) (b).

²¹⁸ Va. Code (1930), §5058 (8).

²¹⁹ See Cornell, "Mental Deficiency," in Nelson's *Encyclopedia of Medicine*, chap. xxix, pp. 545, 552; Sutherland, *Criminology* (1924), p. 106 *et seq.*; National Commission on Law Observance and Enforcement, *Report on the Causes of Crime* (1931), pp. 60-61.

²²⁰ 3 Coke Inst. 4.

²²¹ *State v. Vann* (1881) 84 N.C. 722; *Grossi v. Long* (1925) 136 Wash. 133, 238 Pac. 983. The rule is so worded in twelve of the twenty-four states having statutes governing the subject. *Arizona*: Rev. Code (1928), §5122; *California*: Penal Code (1931), §1221; *Colorado*: Comp. Laws (1921), §6639; *Georgia*: Code (1926), §1074; *Idaho*: Comp. Stat. (1919),

sections, there seems no reason why persons who have been insane a long time should not be equally exempt.²²² It can no more serve as an example to execute a congenital idiot than one who has become deranged since being sentenced. To require suspension of the execution, however, it must appear that the defendant is so unsound mentally as to be incapable of understanding the nature and purpose of the punishment about to be executed upon him.²²³

The rule applies only to capital cases.²²⁴ The common law made no provision for suspending execution of sentence because of insanity where the punishment was less than death. Modern statutes usually provide that if a convict serving sentence is found by the prison warden to be insane, he may be transferred to a proper hospital or ward for insane criminals.²²⁵

Method of Determining Insanity: Common Law. In seventeen states where the death penalty still exists, there are no statutes outlining the procedure to be followed when a defend-

§9096; *Illinois*: Rev. Stat. (1931), chap. 38, par. 593; *Massachusetts*: Gen. Laws (1921), chap. 279, §48; *Missouri*: Rev. Stat. (1929), §3802; *Nevada*: Comp. Laws (1929), §11069; *Oklahoma*: Stat. (1931), §3174; *Texas*: Complete Stat. (1928), Code of Crim. Proc., art. 928; *Utah*: Comp. Laws (1917), §9175.

²²² *Howell v. Kincannon* (1930) 181 Ark. 58, 24 S.W. (2d) 953; *Howell v. Todhunter* (1930) 181 Ark. 250, 25 S.W. (2d) 21. See *ante*, pp. 337-339.

²²³ See *ante*, pp. 335-336.

²²⁴ *Kelley v. State* (1923) 157 Ark. 48, 247 S.W. 381; *Davidson v. Comm.* (1917) 174 Ky. 789, 192 S.W. 846. A person convicted and sentenced to prison cannot raise the question of present insanity as a reason why sentence should not be carried out. The statute providing for transfer of convicts found to be insane to an asylum is sufficient to guarantee relief in such cases. *Kelley v. State*, *supra*.

²²⁵ Such statutes exist in almost all the states. See, for example: *Ariz. Laws*, 1931, chap. 56; *Cal. Penal Code* (1931), §1587; *Ill. Rev. Stat.* (Smith-Hurd, 1931), chap. 23, par. 141; *Mass. Gen. Laws* (1921), chap. 123, §102; *N.Y. Consol. Laws* (Cahill, 1930), *Prison Law*, chap. 44, §§428, 442; *Pa. Laws*, 1923, No. 414, §308, p. 1007, *Pa. Stat. (Cum. Supp., 1928)*, §14726a-308.

ant under sentence of death appears or is alleged to be insane.²²⁶ It seems that in most of these states the general common-law rule controls, that if a reasonable doubt is raised in the mind of the trial court of the sanity of a person whom it has sentenced to death, the court, in order to prevent the execution of an insane person, may order an inquiry on the matter, and may suspend execution if the defendant is found to be insane.²²⁷ Two of these states, however, Indiana and Pennsylvania, have held that the courts have no power over a person sentenced to death and that only the governor has power to grant a reprieve in such cases.²²⁸

Statutory Procedure. Since at common law a suggestion of insanity made after verdict and sentence did not give rise to an absolute right to have this issue tried before a jury, but addressed itself to the discretion of the judge, it follows that the manner in which this question should be determined is purely a matter for legislative regulation.²²⁹ About half of the American jurisdictions have enacted statutes on the subject. The majority of these leave it to the warden or sheriff having the condemned person in custody to observe the possibility of mental disorder, and to institute proceedings. If there is good reason to suppose

²²⁶ Connecticut, Delaware (but see Del. Laws, 1919, chap. 183), Florida, Indiana, Kansas, Louisiana, Maryland, New Hampshire, New Mexico, North Carolina, Vermont, Virginia, Washington, and West Virginia.

²²⁷ *Nobles v. Georgia* (1897) 168 U.S. 398, 18 Sup. Ct. 87, 42 L. Ed. 515; *Ex parte Chessier* (1927) 93 Fla. 590, 112 So. 87; *Ex parte Chessier* (1927) 93 Fla. 291, 111 So. 720; *In re Smith* (1918) 25 N. Mex. 48, 176 Pac. 819; *State v. Bethune* (1911) 88 S.C. 401, 408, 71 S.E. 29; *Grossi v. Long* (1925) 136 Wash. 133, 238 Pac. 983.

²²⁸ *Diamond v. State* (1924) 195 Ind. 285, 145 N.E. 250, 466 (but see *Parker v. State* [1893] 135 Ind. 534, 35 N.E. 179, 23 L.R.A. 859); *Ex parte McGinnis* (1884) 14 W.N.C. (Pa.) 221; *Ex parte Briggs* (1884) 14 W.N.C. 341; *Ex parte Wilson* (1886) 19 W.N.C. 37; *Baranoski's Case* (1889) 9 Pa. Co. Ct. 264. And see *Comm. v. Barnes* (1924) 280 Pa. 351, 124 Atl. 636.

²²⁹ *Nobles v. Georgia* (1897) 168 U.S. 398, 18 Sup. Ct. 87, 42 L. Ed.

that the defendant has become insane, it is usually provided, the warden or sheriff shall take action under the statute. In Arkansas, Kentucky, and Missouri the sheriff himself in such cases must summon and swear a jury to examine the defendant and hear evidence.²³⁰ In North Dakota and Wyoming, the sheriff must notify the judge of the local court and summon a jury (in North Dakota, of six men; in Wyoming, twelve) to inquire into the matter.²³¹ If the jury find the defendant insane, the judge suspends execution, until the governor transmits a warrant to the sheriff, directing such execution. In California, Arizona, and Oklahoma, the procedure is similar, except that the warden, when there is reason to believe that a defendant under sentence of death has become insane, is required to notify the prosecuting attorney, and the latter files a petition in the court, asking an inquiry.²³² A jury trial is used as in the other states already mentioned.

In Idaho, Montana, and Utah the sheriff or warden summons a jury in such cases "with the concurrence of the judge of the court by which the judgment was rendered,"²³³ and in Nevada, "with the concurrence of the judge of the district court of the county in which such prison is situated."²³⁴ Here too, the trial is by jury. In Mississippi, if the sheriff is satisfied that a convict under sentence of death is insane, he shall, "with the concurrence of the judge of the circuit court, or of the chancellor, or the president of the board of supervisors in the absence of the circuit judge," summon six physicians, or if they are not to be had,

²³⁰ Ark. Dig. Stat. (Crawford & Moses, 1921), §3251; Ky. Codes (1927), Crim. Code of Prac., §296; Mo. Rev. Stat. (1929), §§3802-3805.

²³¹ N.D. Comp. Laws (1913), §§10983-10984; Wyoming Rev. Stat. (1931), §§33-1018 to 33-1020.

²³² Ariz. Rev. Code (1928), §§5122-5125; Cal. Penal Code (1931), §§1221-1224; Okla. Stat. (1931), §§3174-3178.

²³³ Ida. Comp. Stat. (1919), §§9056-9059; Mont. Rev. Codes (1921), §§12095, 12098; Utah Comp. Laws (1917), §§9175-9178.

²³⁴ Nev. Comp. Laws (1929), §§11069-11072.

"other discreet and experienced freeholders and electors" of the county.²³⁵

In all these states, the inquiry, though originated by the sheriff or warden, is finally determined by a jury, usually of twelve men, but sometimes, as in North Dakota and Mississippi, of six. In Ohio, however, upon notice from the sheriff or warden, the court is required to inquire into the matter, and need not impanel a jury unless it desires.²³⁶ In Iowa, the warden, if he has reason to believe that a person awaiting execution of the death penalty is insane, must notify the commissioners of insanity, who examine the defendant and decide the question of his mental condition,²³⁷ and in Nebraska, upon such notice, the court makes only a preliminary sort of examination to decide whether a commission should be appointed to examine the convict.²³⁸ If the judge finds sufficient reason to appoint such a commission, he must appoint the three superintendents of the state insane institutions to examine the convict and report. If they find him insane, the judge suspends execution until further order.

It has been held that a statute providing for the instituting of proceedings by the official having the convict in custody is not exclusive in its provision, and that the court is not deprived thereby of its common-law power to grant relief where a condemned person is insane at the time for execution.²³⁹ Even where the jurisdiction of the warden or sheriff is held to be ex-

²³⁵ Miss. Code (1930), §1310; *Lewis v. State* (1930) 155 Miss. 810, 125 So. 419.

²³⁶ Ohio Ann. Code (1930), §13456-8.

²³⁷ Iowa Code (1931), §§13982-13984.

²³⁸ Neb. Comp. Stat. (1929), §29-2509. This section, it has been held, by implication repeals the provision of section 29-1821, under which the question of whether the defendant has become insane after judgment and before execution must be tried by a jury. *In re Grammer* (1920) 104 Neb. 744, 178 N.W. 624.

²³⁹ *Lewis v. State* (1930) 155 Miss. 810, 125 So. 419; *Barker v. State* (1905) 75 Neb. 289, 103 N.W. 1134. *Contra*: *Howell v. Kincannon* (1930) 181 Ark. 58, 24 S.W. (2d) 953.

clusive, the court has power to review such official's action in refusing to impanel a jury.²⁴⁰

Six jurisdictions have statutes which do not provide for proceedings to be started by the warden or sheriff, but seem to allow the question to be raised before the court by the defendant's counsel or next friend. Of these, three, Colorado, Illinois, and Texas,²⁴¹ require the issue to be tried by a jury; in Alabama and the District of Columbia,²⁴² the court may impanel a jury but is not required to do so; and the New Jersey act²⁴³ seems to contemplate an inquiry by the court itself and does not expressly authorize a jury.

Under the statutes of three states,²⁴⁴ the question of insanity in a person sentenced to death must be decided by the governor. Two other states have held that in the absence of statute, the governor alone has power to act in such cases.²⁴⁵

²⁴⁰ Howell v. Todhunter (1930) 181 Ark. 250, 25 S.W. (2d) 21.

²⁴¹ Colo. Comp. Laws (1921), §6639; Ill. Rev. Stat. (Smith-Hurd, 1931), chap. 38, par. 593; Texas Complete Stat. (1928), Code of Crim. Proc., art. 921, as amended, Laws, 1931, chap. 54.

²⁴² Ala. Code (1928), Crim. Code, §4576. The District of Columbia has no provision specifically referring to the case where the defendant is found insane after sentence of death, but the court has applied in such situation the section of the statutes setting forth the procedure to be followed when insanity is alleged "before trial or after a verdict of guilty." *Gonzales v. U.S.* (1913) 40 App. D.C. 450.

²⁴³ N.J. Laws, 1922, chap. 101, §1, N.J. Comp. Stat. (Cum. Supp., 1911-1924), §53-133n. This act implies that the trial court has power to inquire into the sanity of a person sentenced to death, but does not itself confer such power. The power exists, however, by virtue of the common law. *State v. Battles* (1923) 1 N.J. Misc. 238.

²⁴⁴ Ga. Code (1926), §§1074-1075; Mass. Gen. Laws (1921), chap. 279, §48; N.Y. Code of Crim. Proc., §495-a. The Massachusetts act provides that if it appears to the satisfaction of the governor and council that a convict under sentence of death has become insane, the governor, "with the advice and consent of the council," may respite the execution. This provision gives the power to the governor, and the council's function is merely advisory. *Juggins v. Exec. Council* (1926) 257 Mass. 386, 154 N.E. 72.

²⁴⁵ Indiana and Pennsylvania. See *ante*, note 228.

In Louisiana, there is no statute expressly dealing with the case of convicts sentenced to death who become insane, but the courts have applied to this situation the statute referring to the case of convicts who become insane while serving sentence in the penitentiary.²⁴⁶ Such cases, the act provides, are to be reported by the warden to the district court for interdiction.²⁴⁷ In other states the courts have held that statutes providing for the transfer of convicts who become insane while serving sentence do not apply to persons awaiting execution of the death penalty.²⁴⁸

The power of probate or other courts to make civil adjudications of insanity does not extend to cases of persons convicted of crime.²⁴⁹

Eight states have abolished capital punishment and so have eliminated the problem entirely.²⁵⁰

Procedure on Recovery. When a person found insane after sentence of death later recovers his sanity, he must be returned for execution of the sentence. In about half the American states, the procedure in such cases is regulated by statute. The most common provision is that when the defendant becomes sane, the governor is to issue a warrant appointing a day for the execution of the judgment.²⁵¹ How the governor is to learn of the person's recovery is usually not stated. A few statutes provide

²⁴⁶ State *ex rel.* Lyons *v.* Chretien (1905) 114 La. 81, 38 So. 27; State *v.* Oteri (1912) 129 La. 921, 57 So. 269.

²⁴⁷ La. Ann. Rev. Stat. (Marr, 1915), §3459.

²⁴⁸ *In re Herron* (1909) 77 N.J.L. 315, 72 Atl. 133; *Ex parte Briggs* (1884) 14 W.N.C. (Pa.) 341; Baranoski's Case (1889) 9 Pa. Co. Ct. 264.

²⁴⁹ *Ferguson v. Martineau* (1914) 115 Ark. 317, 171 S.W. 472; *In re Smith* (1918) 25 N. Mex. 48, 176 Pac. 819, 3 A.L.R. 83.

²⁵⁰ Kansas, Maine (except for murder committed in prison), Michigan (except for treason), Minnesota, North Dakota (except for murderous attacks on prison guards), Rhode Island (except for murderous attacks on prison guards), South Dakota, and Wisconsin.

²⁵¹ Ida. Comp. Stat. (1919), §9059; Ky. Stat. (1930), §§1137, 1138; Miss. Code (1930), §1310; Mont. Rev. Codes (1921), §12098; N.D. Comp. Laws (1913), §10985; Ohio Ann. Codes (1930), §13456-10; Wyo. Rev.

that the superintendent is to notify the governor when such person recovers his sanity, and thereupon the governor must issue the warrant.²⁵² In Missouri it seems the governor suspends the execution for a specific period, and "the sentence of the court shall be executed after such period of suspension has expired, unless otherwise directed by the governor."²⁵³ In Nevada, the warrant for execution on recovery may be issued by the governor or by the local court,²⁵⁴ and in Utah, by the board of pardons or the trial court.²⁵⁵

In a number of other states, the question of recovery is determined by the trial court by which the convict was committed. Thus in Alabama, "if it subsequently be made to appear to the court" that the defendant has recovered, the court or judge shall enter an order commanding execution at a date fixed.²⁵⁶ In most of these states the judge's finding is made upon the certificate of the hospital authorities. Under the New Jersey law, the inquiry is made by the court, and may be instituted on the court's own motion, or on that of the attorney general, or of the medical director of the hospital.²⁵⁷ In Nebraska, if it appears to the judge that the convict has become sane, he must appoint a commission consisting of the superintendents of the three state insane institutions, who investigate and decide the question.²⁵⁸

Stat. (1931), §33-1020. In Massachusetts, the execution is held when it appears to the satisfaction of the governor and council that the prisoner is no longer insane. Mass. Gen. Laws (1921), chap. 279, §48.

²⁵² Ariz. Rev. Code (1928), §5200; Cal. Penal Code (1931), §1224; Okla. Stat. (1931), §§3177, 3178.

²⁵³ Mo. Rev. Stat. (1929), §§3801, 8659.

²⁵⁴ Nev. Comp. Laws (1929), §11072.

²⁵⁵ Utah Comp. Laws (1917), §9178.

²⁵⁶ Ala. Code (1928), Crim. Code, §4576. The Iowa law also provides that no patient under criminal charge or conviction shall be discharged without the order of the district court and notice to the prosecuting attorney. Ia. Code (1931), §3511.

²⁵⁷ N.J. Laws, 1922, chap. 101, §2, N.J. Comp. Stat. (Cum. Supp., 1911-1924), §53-1330.

²⁵⁸ Neb. Comp. Stat. (1929), §29-2509.

In New York, the discharge of such persons is by the superintendent of the hospital with the approval of the court.²⁵⁹ In Louisiana²⁶⁰ and Virginia,²⁶¹ the superintendents of the two insane institutions must agree that the person has been restored to sanity, before he is returned for sentence. Under the Georgia act, the judge has the person removed from the hospital to the jail, for resentence, when the superintendent certifies to the judge that such person has recovered, or whenever it appears by inquisition or otherwise that the person has recovered.²⁶²

In New Mexico, the superintendent is required to examine all inmates monthly, and report to the court the names of those found to be sane.²⁶³

The Texas statute provides that a jury trial is to be had to decide whether a person has become sane who was committed as insane after conviction.²⁶⁴ In Illinois, where the statute does not state how the question of recovery is to be determined, the court has held that it should be interpreted as implying that the question should be passed on by a jury, just as when the matter is first raised after sentence.²⁶⁵

Coram Nobis. After conviction and sentence, the defendant may set up as a reason for quashing the proceedings the fact that he was insane at the time of the trial. Within the same term of court at which the conviction was returned, this may be done on motion.²⁶⁶ After the term, the judgment can no longer be set aside on motion. But the almost obsolete writ of error *coram nobis* has been utilized in some cases, for the purpose of inquir-

²⁵⁹ N.Y. Mental Hygiene Law, Cahill's Consol. Laws (1930), chap. 36-a, §85.

²⁶⁰ La. Ann. Rev. Stat. (Marr, 1915), §§3471, 3473, as amended, Acts, 1918, No. 261.

²⁶¹ Va. Code (1930), §1045.

²⁶² Ga. Code (1926), Penal Code, §1076.

²⁶³ N. Mex. Stat. Ann. (1929), §130-806.

²⁶⁴ Tex. Complete Stat. (1928), Code of Crim. Proc., art. 928.

²⁶⁵ *People v. Scott* (1927) 326 Ill. 327, 157 N.E. 247.

²⁶⁶ *Linton v. State* (1904) 72 Ark. 532, 81 S.W. 608.

right provided for in the statutes.²⁷⁴ Writs of error in most states are allowed only upon final judgments, and an adjudication of the mental capacity of a prisoner to stand trial, judgment, or execution is merely preliminary or collateral, and not final in its nature.²⁷⁵ Another reason given by the courts for denying the right to appellate review is that such a right would lead to "absurd results," for "as a finding that insanity did not exist at one time would not be adjudged as to its nonexistence at another, it would be wholly at the will of the convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making claim after claim of insanity, to be followed by trial upon trial, and review upon review."²⁷⁶ In a few states, it seems that an appellate review of the insanity hearing is permitted.²⁷⁷ In Arkansas, an appeal may be

code, and the appellant had been found sane against the great overwhelming preponderance of the testimony, and if every rule of evidence had been violated in the trial, no appeal would lie to this court. . . ." *Ex parte Quesada, supra*.

²⁷⁴ Only in the District of Columbia does the statute expressly preserve the right to appeal and writ of error. D.C. Code (1929), Title 6, §374 ("The person whose sanity is in question shall be entitled to his bill of exceptions and an appeal, as in other cases").

²⁷⁵ *Ex parte Chesser* (1927) 93 Fla. 590, 112 So. 87; *People v. Bechtel* (1921) 297 Ill. 312, 130 N.E. 728; *Crocker v. State* (1884) 60 Wis. 553, 19 N.W. 435.

²⁷⁶ *Bulger v. People* (1916) 61 Colo. 187, 156 Pac. 800. This was a five to two decision.

²⁷⁷ *People v. Scott* (1927) 326 Ill. 327, 157 N.E. 247; *State v. Brodes* (1924) 156 La. 428, 100 So. 610. Both these decisions seem *contra* to earlier cases, denying the right to appeal or writ of error. *People v. Bechtel* (1921) 297 Ill. 312, 130 N.E. 728; *State ex rel. Lyons v. Chretien* (1905) 114 La. 81, 38 So. 27. In California and Georgia, it has been held that where an inquiry on the question of present insanity is held before the criminal trial, the defendant cannot demand that the criminal trial be postponed until an appeal is taken and disposed of on the finding rendered in the insanity inquest. *People v. Moice* (1860) 15 Cal. 329; *Scoggins v. State* (1920) 150 Ga. 72, 102 S.E. 520. This may perhaps imply that a review

had on writ of error *coram nobis*.²⁷⁸ If a trial court refuses a petition for such writ, the matter can be brought before the supreme court on *certiorari*.²⁷⁹

While the right to a review of such a hearing is usually denied, some courts have at times reviewed rulings of lower courts or administrative officers refusing to grant a hearing.²⁸⁰ And where the ruling is found by the upper court to be clearly arbitrary and opposed to the evidence, or based upon an erroneous conception of the law, the ruling may be reversed.²⁸¹

of such inquest is possible, though it cannot be permitted to delay the criminal proceedings. See also *Spann v. State* (1873) 47 Ga. 549.

The Arkansas court has held that an appeal may be had from a finding of sanity on writ of error *coram nobis*. *Dewein v. State* (1915) 120 Ark. 302, 179 S.W. 346. Where the trial court refuses a petition for a writ of error *coram nobis*, *certiorari* is the proper remedy to bring the matter before the supreme court for review. *Hodges v. State* (1914) 111 Ark. 22, 163 S.W. 506.

²⁷⁸ *Dewein v. State* (1915) 120 Ark. 302, 179 S.W. 346.

²⁷⁹ *Hodges v. State* (1914) 111 Ark. 22, 163 S.W. 506.

²⁸⁰ *Sears v. State* (1900) 112 Ga. 382, 37 S.E. 443; *Lee v. State* (1903) 118 Ga. 5, 43 S.E. 994; *Comm. v. Hays* (1900) 195 Pa. 270, 45 Atl. 728; *Holland v. State* (1907) 52 Tex. Crim. 160, 105 S.W. 812. The proper course, when the court denies a motion for a trial on the issue of present insanity, is to take an exception, for unless the point is saved, it cannot be taken advantage of on appeal. *State v. Wade* (1901) 161 Mo. 441, 61 S.W. 800.

²⁸¹ *Howell v. Todhunter* (1930) 181 Ark. 250, 25 S.W. (2d) 21; *Sears v. State*, *supra*; *People v. Geary* (1921) 298 Ill. 236, 131 N.E. 652; *Barker v. State* (1905) 75 Neb. 289, 103 N.W. 1134, 106 N.W. 450, later appeal, 79 Neb. 361, 112 N.W. 1143, 113 N.W. 197.

CHAPTER VIII

SUMMARY OF SUGGESTED REFORMS

§1. WEAKNESSES OF EXISTING LAW AND PROCEDURE

IN the preceding chapters, we have attempted to state, as precisely as possible, the law of the various states governing insanity as a defense to crime. In stating the substantive and procedural rules on the subject, certain weaknesses and ambiguities have appeared. Some of these have been so glaring as to need no pointing out; others have been mentioned in passing; but no systematic attempt has been made to pass upon the merits or soundness of the rules and methods of procedure which we have reviewed.

A vast amount has been written, especially since the beginning of the present century, on the deficiencies of the law dealing with mentally disordered offenders. It is not the purpose of this volume to add to these criticisms, but many concrete suggestions have been made for improving the legal machinery for handling these cases, and in this chapter the more important of these will be briefly reviewed.

Four Main Weaknesses of Present System. Most of the criticisms and suggestions for reform which have been made have been aimed at certain obvious deficiencies of the present procedure. Dr. S. Sheldon Glueck¹ has summarized these deficiencies under four heads: 1. The almost universal lack of proper expert examination of persons accused of crime before trial results in conviction of persons actually insane, who soon after being sent to prison must be transferred to an insane hospital; 2. The tests of responsibility are too narrow and artificial, and are not applied in the light of modern psychiatric knowledge; 3. The jury is rarely given the benefit of competent and unbiased

¹ Glueck, *Mental Disorder and the Criminal Law* (1925), p. 438 *et seq.*

expert judgment on the question of the defendant's mental condition; 4. Due mainly to the abuse of the writ of *habeas corpus* and of special statutory procedure, the discharge of persons sent to insane institutions upon being acquitted of crime by reason of insanity is not governed by scientific principles or by the judgment of those best qualified to say whether discharge would be dangerous to the person himself or to others.

We may now proceed to review some of the reforms which have been proposed to remedy these major defects.

§2. SORTING OUT MENTALLY DISORDERED OFFENDERS BEFORE TRIAL

Value of Preliminary Sorting Out. The question whether a person charged with crime is sane enough to undergo trial is not only first in point of time, but also probably first in importance in the entire problem. Courts and lawyers in the past have been mainly concerned with the problem of "responsibility," and the proper "tests" to be applied in determining whether the defendant at the time of the act was sane enough to be held guilty or not. Today, however, judges and prosecuting officials are beginning to agree with the psychiatrists that it is more economical and efficient, as well as more humane, to sort out the mentally unsound defendants before trial, than to put them through the ordeal of trial, only to transfer them from prison to an insane institution later.

At least two different facilities for detecting mental unsoundness before trial have been suggested.

Psychopathic Clinics. "The first stage at which the question of insanity may be raised is immediately after the arrest of the accused, either before or during his preliminary examination. This is the strategic point, therefore, where some sort of efficient examining agency should function. . . . The ideal machinery would be an efficient psychiatric (psychological-sociological)

clinic, such as is now in operation in some of the municipal courts. This would cover cases of recidivistic misdemeanants, and would also be of aid in informing the magistrate whether, in doubtful cases, accused persons may be released on bail forthwith, or whether they should first be examined by the experts of the state commission of mental diseases."²

Psychiatric clinics or laboratories are now in operation in connection with the municipal courts of Chicago, Boston, Detroit, and other cities.

In New York City, a psychopathic clinic was established some years ago in connection with the police department. Such a police clinic, in large metropolitan centers, can do valuable work, especially preventive work, by detecting potentially dangerous persons of unsound mind. It could "assure the proper disposition of the steady stream of mentally abnormal persons, many of them dangerous characters, who visit police headquarters to make complaints, etc. To the laboratory should also be referred for examination the large number of poorly balanced or defective persons who make complaints to policemen on duty, or who go to the station house to tell their story and often ask for advice and protection. If, instead of being turned away with trivial explanations or simply having their ideas laughed at, such persons were directed to the laboratory, a valuable service could be rendered many mentally sick individuals, and in many instances a danger to the public removed."³

But the clinics for sorting out the mentally unsound offender, says Dr. Glueck, especially the socially expensive recidivistic misdemeanor, should be attached to the lower courts, not the police

² Glueck, *op. cit.*, p. 438.

³ Report of Committee, Psychopathic Laboratory, Police Department, City of New York, Dec., 1917, quoted by Glueck, *op. cit.*, p. 473. For illustrations of the types of cases which such a police clinic might handle, see: Larson and Walker, "Paranoia and Paranoid Personalities: A Practical Police Problem" (1923), 14 *Jour. Crim. Law* 350.

department. "After all, it is the judicial machinery and prosecutor's office which must decide the fitness of a person for trial; and clinics should be an integral part of judicial machinery."⁴

The work that such a court clinic could do, as Dr. Glueck points out, is threefold: it "would be invaluable for the purpose of aiding magistrates in the proper disposition of repeaters, and in deciding upon the wisdom of admission to bail of serious offenders, before more thorough mental examination by the state's experts. Further, such clinics could be utilized by juvenile courts, in cities too small to maintain separate clinics for juvenile offenders, and by domestic relations courts. Finally, the directors of these clinics could do important preventive and educational work by means of addresses to teachers, probation and parole officers, lectures in colleges, etc."⁵

Massachusetts Law for Routine Examination before Trial. Except for the project of establishing clinics and psychopathic laboratories in connection with the trial courts, the Massachusetts "Briggs Law" is almost the only practicable recommendation looking to the sensible objective of sorting out the insane and irresponsible offenders before going through the time-and-money-wasting process of a criminal trial. This law, enacted in 1921, introduced a new principle into the investigation of the mental condition of persons accused of crime, namely, the routine examination before trial of all defendants of certain classes, whether they are alleged or appear to be insane or not. Instead of depending upon the defendant's attorney to raise the matter, or on the judge or penal authorities to notice possible mental unsoundness, the Massachusetts Department of Mental Diseases examines every indicted person coming within the enumerated classes, to determine his mental condition "and the existence of any mental disease or defect which would affect his criminal responsibility." The report of the department is submitted to

⁴ Glueck, *loc. cit.*

⁵ *Ibid.*

the court, and is available to the prosecutor and counsel for the defense.⁶

As first drafted, the law was found to work imperfectly, and it has been four times amended, in 1923, 1925, 1927, and 1929.⁷ With these amendments, it provides in part as follows:

Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by the grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court or the trial justice, as the case may be, shall give notice to the department of mental diseases, and the department shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. Whenever the probation officer of such court has in his possession or whenever the inquiry which he is required to make by section eighty-five of chapter two hundred and seventy-six discloses facts which if known to the clerk would require notice as aforesaid such probation officer shall forthwith communicate the same to the clerk who shall thereupon give such notice unless already given. The department shall file a report of its investigation with the clerk of the court in which the trial is to be held, and the report shall be accessible to the court, the probation officer thereof, the district attorney, and to the attorney for the accused.

Originally, the act made the report of the department "admissible as evidence of the mental condition of the accused." This clause was stricken out by the 1925 amendment, evidently because it was felt to be unconstitutional. The only effect of the report now is to inform the court and counsel of the defend-

⁶ Mass. Cum. Stat. (1929), chap. 123, §100A, added by Acts, 1921, chap. 415.

⁷ Mass. Acts, 1923, chap. 331; Acts, 1925, chap. 169; Acts, 1927, chap. 59; Acts, 1929, chap. 105.

ant's mental condition, and whether it is proper or wise to try him on the criminal charge. In the event that the department finds the defendant not insane, and the court puts him on trial, and he nevertheless urges the defense of insanity and irresponsibility before the jury, the prosecution may call as witnesses the examiners of the department who examined the defendant and submitted the report.

Advantages of Massachusetts Law. This procedure has several advantages over the usual method of handling the problem found in other states. First of all, routine examination of all offenders of the types enumerated eliminates the haphazard system of leaving the recognition of mental unsoundness to laymen. In all states but Massachusetts, the question of insanity arises in a criminal case only if counsel or friends of the defendant are able to perceive that the defendant may not be normal mentally, and suggest the fact to the court, or if the court itself perceives it. Under the Massachusetts act, every indicted person coming within the classes named must be examined, whether anyone says or thinks he is insane or not. In other words, the statute discards the common but fallacious assumption that while physical diseases require professional diagnosis, mental disease can be detected by any sensible man upon simple observation.

Secondly, the examination is conducted by a neutral, unbiased agency, wholly independent not only of both sides, but even of the court itself. Expert testimony in insanity cases has been discredited mainly because the experts are known to be partisan. Judges have sometimes been hardly less skeptical than juries about the value and reliability of expert testimony. The New York Court of Appeals has been credited with the statement that "it is generally safer to take the judgment of unskilled jurors than the opinions of hired and generally biased experts."⁸

⁸ *People v. Barberi* (1896) 47 N.Y. Supp. 168, 174.

In contrast with this attitude is the high regard with which the reports of the experts of the department have been accepted by the Massachusetts courts.

"It is a matter of general knowledge," the Supreme Judicial Court has declared, "that there are in the service of the Commonwealth under this department persons eminent for special scientific knowledge as to mental diseases. The examinations under the statute, therefore, may fairly be assumed to have been made by competent persons, free from any predisposition or bias, and under every inducement to be impartial and seek for and ascertain the truth."⁹

A third important advantage lies in the fact that the law provides for examination before trial, thus saving the state the expense of what may be a long and complicated criminal trial, and also humanely saves insane persons from being subjected to the ordeal of such a trial. The examination is made upon indictment, and before the accused has decided whether to resort to the frequently abused defense of "insanity" or not. The saving to the state which the law has made possible, by eliminating criminal trials in cases of persons found mentally disordered on this examination, has amounted to thousands of dollars annually.¹⁰

In addition, the law performs the worthy task of educating judges, prosecuting attorneys, and legislators in the psychiatric view of mental disorder. The case reports of the department can do much to give courts and counsel a scientific view of the etiology and symptomatology of mental diseases. The law should also result in the accumulation of valuable scientific data on the relationship of crime and mental disorder.

⁹ *Comm. v. Deveraux* (1926) 257 Mass. 391, 153 N.E. 881.

¹⁰ "The expense of a murder trial amounts to \$30,000, so an average saving of over \$10,000 is easily made on each case—a great economy to the State." Dr. L. Vernon Briggs, in a discussion before Annual Meeting of the New Hampshire Medical Society, May, 1929, 201 *New Eng. Jour. of Medicine* 479.

Difficulties and Weaknesses of the Massachusetts Law. The act at present is still not perfect, and its enforcement has not always been easy. It was enacted only as a result of persistent efforts by Dr. Vernon L. Briggs and other eminent psychiatrists and criminologists of the state, and after rough treatment in the legislature.¹¹

One weakness of the act is that it applies only to certain types of offenders—those indicted for capital offenses, those who have been more than once indicted for an offense, and those who have been previously convicted of a felony. "Capital offenses" excludes manslaughter, although from a social and a psychiatric point of view there seems no reason why a distinction should be made between the two kinds of homicide. This is perhaps not a serious criticism, however, because grand juries usually find true bills for first degree murder, under which the person may be convicted of manslaughter if the facts warrant.

The second difficulty is that of obtaining the records of prior indictments and convictions. As first enacted, the law put the entire duty of reporting proper cases on the court clerks. Due partly to negligence but no doubt also to the lack of records of prior indictments or convictions, the clerks failed to report in many cases. In 1925, a clause was added imposing a fine on clerks who wilfully neglected to notify the department of cases coming within the act. This did not solve the difficulty, and in

¹¹ As originally passed, the act contained no appropriation to carry out its provisions. At the request of Dr. Briggs, the experts agreed to examine these cases without charge to the state. Since 1923, the law has provided that the examiners are to be paid the nominal sum of four dollars a day. This, as Dr. Glueck has said, "is hardly better than no payment at all. When no compensation was forthcoming, the experts appointed by the state voluntarily performed what they considered to be their duty; it is difficult to blame them now if some of them are more insulted than delighted with the four-dollar fee for an examination that means so much in the way of responsibility and that may require three or four visits and interviews several hours long." Glueck, *Mental Disorder and the Criminal Law* (1925), p. 60.

1927 the probation officers, who had already been given the duty of investigating the records of persons charged with serious offenses, were required to notify the court clerks of prior indictments or convictions.

Another difficulty in the practical working of the law, mentioned by Dr. Winfred Overholser, director of the department's Division for the Examination of Prisoners, has been that at times the department has been requested to make examinations on very short notice.

A telephone call may be received that a defendant whose case is being then reported is to appear in court the following day, and that report is desired by that time. In a few instances, in fact, the Department has been asked to make examinations in the dock or in the prisoner's room at the court-house, the judge waiting in the meantime for the report. It is hardly necessary to say that the intention of the law was to give ample time for a thorough examination, not for a hasty or cursory one hardly worthy of the name. The Department has encouraged the examining psychiatrists so far as possible to have a psychometric examination and a social investigation made, just as would be done in a mental hospital. Instances are on record where failure to do this has resulted in demonstrably erroneous conclusions.¹²

The Massachusetts Law in Action. Statistics for the first nine years of the law's operation show that 1,365 defendants have been examined, of whom 259, or 18.9 per cent, were found to be definitely or suggestively abnormal mentally. These statistics are cited by Dr. Briggs and others to refute the charge sometimes heard that if the psychiatrists had their own way, they would make out every offender a mental case.

The courts have on the whole been inclined to follow the recommendations of the examiners. Defense counsel also have

¹² Overholser, "Psychiatry and the Massachusetts Courts as Now Related" (1929), 8 *Social Forces* 77.

cooperated to an extent which even the most hopeful proponents of the law had not expected. Almost without exception, counsel have raised no objection to having clients examined by the department's experts, although before the act was passed it was objected that defense lawyers would never allow such examination.¹³ Also, counsel have in almost every instance recognized the fairness of the examiners' report, and have not attempted to contradict their finding by putting other experts on the witness stand. The department's report is usually accepted by both sides, and no other expert testimony is introduced. The act has therefore eliminated the most depressing spectacle which the criminal law affords, the "battle of experts," in which real and pseudo-experts, without distinction, are subjected to lengthy hypothetical questions and heckling cross-examinations.

While scarcely out of the experimental stage, the Massachusetts act has already proved its value sufficiently to be hailed as "the most farsighted piece of legislation yet passed on this subject."¹⁴ Its adoption in other states has been recommended.¹⁵

Examination by Official Experts of Persons Remanded by the Courts. In England two plans have been suggested by Dr. M. Hamblin Smith:

(a) To divide the country into convenient districts, each with a central prison, at which a specialist can be stationed, and at which there is a proper hospital for the reception of cases remanded for examination.

(b) To have a travelling mental expert in each district. This plan is now being tried in the State of Illinois. This might be combined

¹³ *Ibid.*

¹⁴ Glueck, *op. cit.*, p. 58.

¹⁵ *Illinois Crime Survey* (1929), p. 804. A similar measure had been proposed in Sweden ten years before the enactment of the Massachusetts law. Kinberg, "Obligatory Psychiatric Examination of Certain Classes of Accused Persons" (1912), 2 *Jour. Crim. Law* 858. A bill of this type was vetoed by the governor of Maryland in 1929. Md. Laws, 1929, chap. 371, pp. 1022, 1436.

with the first plan. It has certain advantages. On the other hand, the examiner would have to waste much time in travelling. And the examination might have to be made in unsuitable surroundings, and at a time when neither subject nor examiner was in the best mood. On the whole, the author thinks the first plan is preferable.¹⁶

The model Code of Criminal Procedure drafted by the American Law Institute contains a somewhat similar provision, recommended for states where there are public mental institutions to which defendants may conveniently be committed for examination, or where there is a department of mental diseases or similar department, adequately equipped to make such examination. In such states, the code provides, the court should have the power, pending a hearing on the question of a defendant's mental capacity to stand trial, to have the defendant examined by two experts appointed by the court, or to commit him to the state institution (or the state department of mental diseases, etc.) for examination. For states which have no public institutions to which defendants can conveniently be sent for a mental examination, and no official agency corresponding to a department of mental diseases, the procedure provided by the model Code of Criminal Procedure is substantially the same as at common law, namely, that if the court has a reasonable doubt of a defendant's mental capacity to stand trial, it may order a hearing on that issue, and may appoint two "disinterested qualified experts" to examine the defendant and testify at the hearing.¹⁷

¹⁶ Smith, *The Psychology of the Criminal* (1922), pp. 167-168.

¹⁷ The section of the model Code of Criminal Procedure (Philadelphia: The American Law Institute, 1930) dealing with the question of insanity before trial is as follows:

"Section 317. *Examination of defendant's mental condition to determine whether he shall be tried.* (1) If before or during the trial the court has reasonable ground to believe that the defendant, against whom an indictment has been found or information filed, is insane or mentally defective to the extent that he is unable to understand the proceedings against him

§3. REVISING THE TESTS OF IRRESPONSIBILITY

Recognition of Irresistible Impulse as a Defense. The question of the proper test of criminal responsibility, although in practice probably not the most important, in the discussions of lawyers and jurists is the most popular ground for dispute in the whole field of crime and insanity. A vast literature exists on this subject, most of it philosophical and legalistic rather than scientific in nature. Usually, the discussion has centered about the existing tests, and the necessity or desirability of revising them. Perhaps the most serious criticism which has been made of the

or to assist in his defense, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The court may appoint two disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

"(2) If the court, after the hearing, decides that the defendant is able to understand the proceedings and to assist in his defense it shall proceed with the trial. If, however, it decides that the defendant through insanity or mental deficiency is not able to understand the proceedings or to assist in his defense it shall take proper steps to have the defendant committed to the proper institution. If thereafter the proper officer of such institution is of the opinion that the defendant is able to understand the proceedings and to assist in his defense, he shall report this fact to the court which conducted the hearing. If the officer so reports, the court shall fix a time for a hearing to determine whether the defendant is able to understand the proceedings and to assist in his defense. This hearing shall be conducted in all respects like the original hearing to determine defendant's mental condition. If after this hearing the court decides that the defendant is able to understand the proceedings against him and to assist in his defense it shall proceed with the trial. If, however, it decides that the defendant is still not able to understand the proceedings against him or to assist in his defense it shall recommit him to the proper institution."

For states which have public institutions for investigating the mental condition of persons, to which defendants can conveniently be committed for examination, the Code recommends an alternative provision, worded exactly like the one above, except that it provides that the court may either appoint two disinterested qualified experts to examine the defendant

M'Naghten Case rules is that they cover only disorders of the cognitive or intellectual phase of the mind, and make no allowance for disorders characterized by deficiency or destruction of volition, or will-power. One of the most often urged changes in the legal test is, therefore, that this omission should be remedied, by adding irresistible impulse to the right and wrong test, as has already been done in almost half of the American states.¹⁸ The Committee on Insanity and Crime, appointed in 1923 by the Lord High Chancellor of Great Britain, Lord Birkenhead, after considering the recommendations of various bodies, found:

1. It should be recognized that a person charged criminally with an offense is irresponsible for his act when the act is committed under an impulse which the prisoner was by mental disease in substance deprived of any power to resist.

2. Save as above, the rules in M'Naghten's Case should be maintained.¹⁹

and testify at the hearing, "or it may commit the defendant to the proper institution for observation and examination regarding his present mental condition. The proper officer of such institution shall present to the court which conducted the hearing a report regarding the defendant's present mental condition. He may also be summoned to testify at the hearing."

In states where there is a department of mental diseases, as in Massachusetts, or department of public welfare, as in Illinois, or a similar department, adequately equipped to make the necessary examination of defendant's mental condition, the Code recommends that the clause, "it may commit the defendant to the proper institution for observation and examination regarding his present mental condition," be changed to "it shall direct the department of ——— to make an investigation and examination regarding the present mental condition of defendant."

The model Code of Criminal Procedure also contains another section, providing for appointment of experts by the court, in cases where insanity or mental defect on the part of the defendant at the time of the alleged commission of the offense charged becomes an issue in the cause. See p. 421.

¹⁸ See p. 15.

¹⁹ Report of Committee on Insanity and Crime, etc. (1923), p. 8. Quoted by Brasol, *Elements of Crime* (1927), p. 292.

This same suggestion had been made half a century earlier, by Sir James Stephen.²⁰

Abolition of Delusion Tests. Another change which has been strongly urged is that the rules laid down in M'Naghten's Case concerning delusions and "partial insanity," particularly the rule that a person laboring "under partial delusion only," and not in other respects insane, "must be considered in the same situations as if the facts with respect to which the delusion exists were real," should be abolished as unscientific.

We have already referred to Judge Ladd's denunciation of the "exquisite inhumanity" of the rule.²¹ Psychiatrists have emphasized the fact that the existence of delusions is a symptom of more radical mental disturbance, and that it cannot be considered apart from its setting in the entire symptomatology; the assumption that a person may be suffering from delusion and yet be "not in other respects insane," is fallacious; and the mistake of fact rule of delusion is bad law, because it is based upon bad psychopathology. Its abolition has been urged not only by medico-legal writers, but also by legal authorities.²²

Adoption of Concept of Semi-Responsibility. Another weak-

²⁰ Stephen probably had a wider knowledge of forensic psychiatry than any other legal writer of his time. He proposed the adoption of three tests of irresponsibility, as follows:

"No act is a crime if the person who does it is at the time when it is done prevented (either by defective mental power or) by any disease affecting his mind—

"(a) from knowing the nature and quality of his act; or,

"(b) from knowing that the act is wrong; (or,

"(c) from controlling his own conduct, unless the absence of the power of control has been produced by his own default.)"

The parts in parentheses Stephen regarded as doubtful. Stephen, *Digest of the Criminal Law* (5th ed., 1894), art. 28.

²¹ See p. 76.

²² Glueck, *Mental Disorder and the Criminal Law* (1925), pp. 249, 430; Maudsley, *Responsibility in Mental Disease* (1892), p. 97; Stephen, *History of the Criminal Law of England* (1883), vol. ii, pp. 160, 163;

ness of the existing tests of responsibility which has been pointed out is that they make no provision for the important group of borderline mental conditions. It is well known that there is no clear-cut line between the "sane" and the "insane." The two grade into each other as day passes into night, and between the two extremes are certain twilight conditions, not serious enough to render the victim irresponsible for crime, under the existing tests, nor even to require his confinement as an insane person in a hospital, but nevertheless rendering him incapable of sound, calm judgment, especially under the conditions of stress at which crime may be resorted to.²³

These borderline types of mental unsoundness are sometimes referred to as "partial insanity." It may be well to point out the distinction between this use of the term and the "partial insanity" discussed in M'Naghten's Case and in judicial decisions ever since, i.e., insanity in regard to one subject only, or monomania. Though much talked about by judges, such a disorder as monomania probably does not exist.²⁴ The mind is a unit, and a disease manifesting itself along one subject is a disease of the whole mind, not of a part. It would seem well, therefore, for courts to follow the example of psychiatrists, and discard the use of the term "partial insanity" in the sense of monomania. In connection with the theory we are discussing, "partial insanity" means a mental impairment which is not so complete as

Wharton and Stillé, *Medical Jurisprudence* (5th ed., 1905), vol. i, "Mental Unsoundness," pp. 836-838; Keedy, "Insanity and Criminal Responsibility" (1917), 30 *Harv. Law Rev.* 535, 558.

²³ "We are forced to unequivocally commit ourselves to the opinion that many individuals who commit misdeeds have abnormal impulses, or are temporarily or chronically weak in the powers of self-control. This is the basis for the idea of lessened moral responsibility which accords truly with facts." Healy, *The Individual Delinquent* (1915), p. 30. See also Grasset, *The Semi-Insane and the Semi-Responsible* (Eng. trans. by Jelliffe, 1907), p. 349; Pressey, *Mental Abnormality and Deficiency* (1927), chap. vii.

²⁴ See p. 76.

to render its victim irresponsible for his criminal acts. The distinction between the two concepts is not difficult, and was pointed out as early as 1650 by Lord Hale, who distinguished between insanity partial in respect to particular subjects and insanity partial as to degree.²⁵

There are, as we have seen, two types of cases in which this concept of "limited responsibility" may be called into play: (1) cases in which, though there is evidence of mental disorder which probably was a contributing cause in the criminal conduct, the disorder is not of such a type as to come within the legal test, so as to render the person irresponsible; (2) cases in which, by reason of mental disorder, the person was incapable of deliberation, premeditation, malice, or other mental state usually made a requisite for first degree offenses, and in which, therefore, a lesser offense than that charged was in fact committed. No allowance is made for the first type, as we have said.²⁶ The second is taken account of only in eight or nine states.²⁷ While logically, there is no reason why mental disorder should not be given the same consideration as intoxication in determining the defendant's capacity to entertain the criminal intent requisite to the crime charged, nevertheless, the acceptance of this doctrine would raise certain difficulties.

1. It would require the jury to determine the existence of such borderline disorder in the defendant. This of itself is no easy task, but even if the jury can say with some degree of certainty that such a condition exists, it would then have to answer the still more difficult question, whether such disorder rendered the defendant incapable of the specific intent required by the crime charged.

2. A corollary to this first difficulty is the objection that if this rule is accepted, "when conflicting evidence of alienists is introduced there will be danger of a compromise by the jury and

²⁵ 1 Hale P.C. 30.

²⁶ See p. 99.

²⁷ See pp. 100-101.

either a prisoner who is responsible will receive too light a punishment or one who ought to escape altogether will be condemned."²⁸

In answer to this objection it may be pointed out that the possibility of such compromise verdicts already exists. In most cases, the jury can find a defendant charged with murder guilty of manslaughter, and in some states the jury also has the power to determine the degree of murder, or to fix the punishment, or to determine both the law and the facts. Since we give the jury power to reduce the punishment in cases where no legal basis exists for such reduction, why not also in cases where it is scientifically and logically merited? "Illogical verdicts," it has been said, "are more likely to result from illogical than from logical rules."²⁹

Two other objections can be raised in the event that the doctrine is applied to other mental elements than deliberation and premeditation. So far, there have been no cases in which mental disorder has been permitted to negative the specific intent required in any particular crime, except these two elements of first degree murder. Logically, however, there is no reason why it should be so restricted. On the contrary, it applies equally well to all crimes requiring a specific intent. With respect to intoxication, the rule has been thus extended.³⁰ However logical such an extension of the doctrine may be, its effect upon the law would be revolutionary.

3. As has been emphasized, the doctrine is not one of mitigation. It does not purport to judge these individuals by a more lenient standard than others. On the contrary, it relieves the accused from liability for first degree murder because, judged by exactly the same standard as anyone else, his act being without

²⁸ 30 *Harv. Law Rev.* 179.

²⁹ Keedy, "Insanity and Criminal Responsibility" (1917), 30 *Harv. Law Rev.* 535, 554.

³⁰ See p. 91.

the specific intent which is an essential element of the crime charged (his mental condition rendering him incapable of entertaining such intent), he must be acquitted of that crime and convicted, if at all, of some lesser offense.

Now, however, if the lesser offense also requires a specific intent, of which the defendant was mentally incapable, or if there is no lesser offense, it would seem he must be acquitted entirely. But this would be equivalent to setting up a new test of responsibility for all crimes requiring a specific criminal intent. The existing tests (capacity to understand the wrongfulness of the act and, in some states, to resist the impulse to commit it) would be supplemented or supplanted by the new test: Did the defendant, at the time of the act charged as criminal, have the necessary criminal intent, or did his mental unsoundness (or other circumstance) render him incapable of forming or entertaining that intent?

The desirability of such a test is discussed in the next paragraph. Here, our purpose is only to point out that the theory of semi-responsibility, if carried to its logical conclusion, would revolutionize the law governing the test of mental responsibility for crime.

4. If the doctrine is extended to other crimes than murder, still another objection may be raised. Criminals afflicted with certain of the borderline mental deficiencies would receive shorter prison terms, and so would be turned loose on society sooner than sane and perhaps less dangerous criminals. The objection is a valid one, and can be met only by providing some method for the treatment as well as the punishment of such defective criminals.

Capacity to Entertain Guilty Intent as Sole Criterion of Responsibility. A suggestion which has been put forward in various forms is, that all arbitrary tests of responsibility should be abolished, and that the only question in every case should be whether the defendant committed the act charged (if he did commit it)

with the specific intent required to constitute the crime charged, or whether, by reason of mental disorder, or any other cause, he was at that time incapable of forming or entertaining such intent.³¹ This theory was first suggested as early as 1866,³² by Judge Doe in New Hampshire, and has been adopted as law in that state since 1871. The real ultimate question, the New Hampshire court has said, in a case where the defendant admits the act but sets up insanity as a defense, is, "whether, at the time of the act, he had mental capacity to entertain a criminal intent—whether in point of fact, he did entertain such intent."³³

A similar rule was recommended by a committee of the American Institute of Criminal Law and Criminology, headed by Professor Edwin R. Keedy, which drew up a model criminal responsibility bill some years ago.³⁴

Abolition of All Legal Tests. The New Hampshire rule abolishes all legal tests of insanity, and holds that all such tests are for the experts, and not legal questions. Nevertheless, it does require that the mental disorder must have been the cause of the act, and must have rendered the person incapable of entertaining the guilty frame of mind essential to constitute the crime charged. This seems a vague enough rule to submit to a jury, but even this has been eliminated in some suggestions which have been made, namely, that any form of scientifically recognizable mental disorder should be grounds for holding the person irresponsible for crime. Thus in England it has been proposed that: "No act done by a person in a state of insanity, or suffering from mental defect, to such a degree as to justify his

³¹ Stephen, *History of the Criminal Law of England* (1883), vol. ii, p. 97; Bishop, *New Criminal Law* (1892), vol. i, p. 231; Keedy, "Insanity and Criminal Responsibility" (1917), 30 *Harv. Law Rev.* 535; Keedy, "Criminal Responsibility of the Insane" (1921), 12 *Jour. Crim. Law* 14.

³² Boardman v. Woodman, 47 N.H. 120.

³³ State v. Jones (1871) 50 N.H. 369, 382.

³⁴ Keedy, "Insanity and Criminal Responsibility" (1917), 30 *Harv. Law Rev.* 535.

being placed under care, treatment, and control, can be punished as an offense."³⁵ A committee of the British Medico-Psychological Association, appointed in 1923 to study the problem of criminal responsibility, proposed the following:

1. Abrogate the M'Naghten's Case rules, and make responsibility a question of fact for the jury.
2. Where insanity is an issue, direct the jury to answer the question:
 - a. Did the defendant commit the act?
 - b. If so, was he at the time insane?
 - c. If insane, has it been proved that the crime was unrelated to his mental disorder?³⁶

In this country, Mr. Arthur Train has similarly suggested that the only question should be whether the defendant had a disease of a scientifically recognized type, and whether the act was such as would naturally flow from that type of insanity, and he has further pointed out that the current tests of responsibility could be revised to meet this reform by simply rewording them to read that the defendant must have such knowledge of the wrongfulness of the act and such control over his will as to be a proper subject for punishment.³⁷

Among the objections of the Committee on Insanity and Crime to the proposal of the Medico-Psychological Association was the fact that the proposal gave no clue as to what they regard as the test of criminal responsibility.³⁸ The same may be said of the suggestions of Mr. Smith and Mr. Train. They ignore and, indeed, seek to abolish the distinction between mental disorder as such, and mental disorder of such degree as to relieve the

³⁵ M. Hamblin Smith, *The Psychology of the Criminal* (1922), p. 12.

³⁶ Report of Committee on Insanity and Crime, etc., pp. 31, 32; quoted by Taylor, *Med. Juris.* (8th ed., 1928), p. 833; and Singer and Krohn, *Insanity and Law* (1924), p. 294.

³⁷ Train, *The Prisoner at the Bar* (1908), p. 368.

³⁸ Report of Committee on Insanity and Crime, etc., reported by Glueck, *Mental Disorder and the Criminal Law* (1925), p. 458.

person from responsibility. However, it does not seem desirable to permit any form of mental disease or deficiency, no matter how slight, to excuse a person from the consequences of his wrongful acts, and these suggestions afford the jury no assistance in determining what degree of mental disorder should operate to excuse a defendant, and what should not.

§4. THE PROBLEM OF PROOF

Procedure for Taking Expert Testimony Needs Revision. The part of our system of criminal procedure which stands in greatest need of reform is the mode in which medical evidence as to the accused person's mental state is obtained. If the adjudication of the defendant's "sanity" and responsibility must be left to a jury of laymen, at least the jury should be given the benefit of sound, reliable expert opinion on the matter. That our present method of presenting expert testimony fails to do this can hardly be disputed. Probably no other part of the criminal law governing the defense of insanity has been so severely criticized as the rules governing expert testimony.

Three main deficiencies have been charged against the testimony of experts as usually presented:

1. Any reputable practicing physician is legally qualified to speak as an expert on insanity, even though he may never have had any instruction or experience in mental disease. The result is that it is always possible to hunt up eccentric or exceptional "experts" whose fantastic theories will permit them to testify as counsel wishes. The jury is usually unable to distinguish the true expert from the quack, and obviously has no way of knowing how many experts refused to testify as counsel wished, before acceptable experts were found. The law relies upon cross-examination to reveal the witness' incompetency or inaccuracy, but as a matter of fact it is usually the least learned who are most positive in their assertions, and the witness whose judgment is unobscured by any knowledge of the subject is the one who will

probably make the best impression on the jury. Furthermore, leaving the witness' qualifications to be brought out on cross-examination too often leads to the deplorable badgering and exchange of personalities for which these cases have become notorious.

2. The partisan nature of the expert's services makes it difficult to obtain reliable and unbiased opinion.³⁹ The practice, peculiar to Anglo-Saxon jurisprudence, of allowing experts in criminal trials to be called on behalf of the parties, lies at the root of some of the gravest evils of which such trials are productive.

3. The opinion testified to is in many cases not based upon sufficient scientific examination. Instead of being founded upon a thorough physical, mental, and neurological examination of the defendant and a study of his case history, the witness' opinion is too often based solely upon what the defendant chooses to tell about himself or what his family tells about him, or, worse yet, is based upon a hypothetical question, including only such facts, proved or hoped to be proved, as tend to support the questioner's side of the case.

To remedy these deficiencies, a variety of proposals has been offered.

Defining Qualifications of Expert Witnesses. It has been recommended that the qualifications of experts should be defined by law, and that all persons offered as expert witnesses be required to meet these standards. The qualifications might be defined by the legislature itself, or left to a qualified board of examiners, or to some learned neuropsychiatric body or association. Or else such association, or the court, might draw up a list of experts qualified to serve, from whom witnesses could be drawn by counsel for each case, or the medical association or the court could itself select the experts from this list for each case.⁴⁰

³⁹ White, *Insanity and the Criminal Law* (1923), pp. 56-57.

⁴⁰ *Illinois Crime Survey* (1929), pp. 769-770, 805; E. J. McDermott,

Abolition of Hypothetical Questions. The hypothetical question has been condemned as misleading, unfair, an excrescence and a disgrace to the law and a travesty on justice.⁴¹ The expert, on such questions, "is limited to hypotheses and assumptions selected for him by counsel, selections made with the object of securing an opinion favorable to the side of the case which the lawyer represents."⁴² No one has been more insistent on the worthlessness of answers to such questions than the alienists themselves. Dr. William A. White, one of the most eminent psychiatrists in the country, has said that "in a large experience I have never known a hypothetical question, in a trial involving the mental condition of the defendant, which in my opinion offered a fair presentation of the case."⁴³

The abolition of the hypothetical question has been urged not only by individual medical writers, but also by such bodies as the New York Psychiatric Society⁴⁴ and the American Psychiatric Association.⁴⁵ The conclusions of the witness, based

"Needed Reforms in the Law of Expert Testimony" (1911), 1 *Jour. Crim. Law* 698; "Insanity and Criminal Responsibility" (Report of Committee B of the Institute, E. R. Keedy, Chairman) (1911), 2 *Jour. Crim. Law* 521, 526, 536, 543; Glueck, *op. cit.*, pp. 488-489.

The New York State Bar Association in 1909 recommended a bill making it the duty of the Supreme Court to designate at least ten and not more than sixty physicians in each judicial district from which parties or courts might select expert witnesses, who were to be paid such fees as the court might fix. *Am. Bar Ass'n Reports* (1909), p. 665.

⁴¹ L. Vernon Briggs, "Medico-Legal Insanity and the Hypothetical Question" (1923), 14 *Jour. Crim. Law* 62, 72.

⁴² Singer and Krohn, *Insanity and Law* (1924), p. 407.

⁴³ White, *op. cit.*, p. 86.

⁴⁴ "The New York Psychiatric Society disapproves of the practice of using set hypothetical questions as a method of bringing out expert medical testimony." Recommendation made in 1921 by the Society's Committee on Medical Expert Testimony in Relation to Hypothetical Questions. (1923), 14 *Jour. Crim. Law* 74.

⁴⁵ Menninger, "Medicolegal Proposals of the American Psychiatric Association" (1928), 19 *Jour. Crim. Law* 367, 376.

upon his study of the defendant, should be stated directly, it is urged, preferably in writing, instead of in answer to questions.⁴⁶ If it cannot be abolished, Dr. Morton Prince has suggested that, at least, "when the hypothetical question is put, it should be in writing, and the answer given in writing after time for due consideration and weighing of the facts."⁴⁷

Appointment of Experts by the Court. A suggestion often made is that the trial judge should appoint experts to examine the defendant and testify at the trial, subject to cross-examination by both sides. Such a provision was included in a model Expert Testimony Bill drafted by a committee of the American Institute of Criminal Law and Criminology some years ago.⁴⁸ In 1930, the model Code of Criminal Procedure drafted by the American Law Institute was published, containing a similar provision, as follows:

§318. *Appointment of Expert Witnesses by the Court.* Whenever on a prosecution by indictment or information the existence of insanity or mental defect on the part of the defendant at the time of the alleged commission of the offense charged becomes an issue in the cause, the court may appoint one or more disinterested qualified experts, not exceeding three, to examine the defendant. If the court does so, the clerk shall notify the prosecuting attorney and counsel for the defendant of such appointment and shall give the names and addresses of the experts so appointed. If the defendant is at large on bail, the court in its discretion may commit him to custody pending the examination of such experts. The appointment of experts by the court shall not preclude the State [Commonwealth or People] or defendant from calling expert witnesses to testify at the trial and in case the defendant is committed to custody by the court they shall be

⁴⁶ Singer and Krohn, *op. cit.*, p. 416.

⁴⁷ Discussion of Report of Committee on Insanity and Criminal Responsibility (1911), 2 *Jour. Crim. Law* 539.

⁴⁸ Quoted by Keedy, "Insanity and Criminal Responsibility" (1917), 30 *Harv. Law Rev.* 535, 537.

permitted to have free access to the defendant for purposes of examination or observation. The experts appointed by the court shall be summoned to testify at the trial and shall be examined by the court and may be examined by counsel for the State [Commonwealth or People] and the defendant.

§319. *Fees for Expert Witnesses.* When expert witnesses are summoned by the court as provided in sections 317 and 318, they shall be allowed such fees as the court in its discretion deems reasonable, having regard to the services performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found or the information filed.

The appointment of expert witnesses by the court has been recommended also by other authorities,⁴⁹ and has been provided for by statute in a few states.⁵⁰ No doubt the inclusion of such a provision in the model code will induce other states to adopt it. The earlier Expert Testimony Bill was criticized for failing to define the qualifications of experts, thus continuing the evil of permitting doctors unlearned in mental disorders to testify as experts in such cases,⁵¹ and the same criticism can be applied to the more recent model code. To guarantee the competence of the experts summoned by the court, it has been suggested that the court be required to make its appointments from a list of qualified experts prepared by some national organization of scientific repute and unquestioned moral standing or an institute of scientific criminology,⁵² or that they be drawn from an official staff of experts attached to the court, as in Germany and France. The American Bar Association in 1929 recommended

⁴⁹ *Missouri Crime Survey* (1926), p. 371; Wigmore, "To Abolish Partisanship of Expert Witnesses, as Illustrated in the Loeb-Leopold Case" (editorial) (1924), 15 *Jour. Crim. Law* 341; Singer and Krohn, *op. cit.*, p. 415.

⁵⁰ California, Colorado, Indiana, New York, Ohio, Rhode Island, Vermont, Wisconsin. *Ante*, p. 210 *et seq.*

⁵¹ Glueck, *op. cit.*, pp. 451-452.

⁵² Brasol, *Elements of Crime* (1927), p. 322.

"that there be available to every criminal and juvenile court a psychiatric service to assist the court in the disposition of offenders."⁵³

Under the proposed code and in conformity with other suggestions made along this line, the prosecution and the defense would not be prohibited from calling expert witnesses also. In some quarters, however, it has been urged that the court's experts should be the only ones permitted to testify, and that both prosecution and defense should be barred by law from introducing expert testimony.⁵⁴ This scheme would probably be unconstitutional. Indeed, the Michigan and Illinois Supreme Courts, by a fantastic process of reasoning, have held it unconstitutional for the trial court to call experts even where both sides were allowed to introduce other experts.⁵⁵

Written Reports: Commitment for Observation. A committee of the American Psychiatric Association, composed of eminent psychiatrists, in 1928 recommended that expert witnesses should be given "opportunity for thorough psychiatric examination using such aids as psychiatrists customarily use in practice, clinics, hospitals, etc., with obligatory written reports and remuneration from public funds."⁵⁶ Brasol proposes requiring the psychiatrist to present "an all-embracing study of the mental constitution of the defendant, in the light of the latest discoveries in the fields of psycho-neurology, bio-chemistry, biology, and psychology."⁵⁷

⁵³ Am. Bar Ass'n Reports (1929) vol. 54, p. 56. Dr. Herman M. Adler, as a result of his investigation in connection with the Cleveland Crime Survey, recommended that a chief psychiatrist be appointed by the judge of the probate court from a civil service list, this chief psychiatrist to be empowered to appoint assistants and to examine and pass upon all cases, both from the civil and the criminal courts, in which the question of insanity, epilepsy, or mental deficiency is raised. *Criminal Justice in Cleveland* (1922), p. 479.

⁵⁴ Brasol, *loc. cit.*

⁵⁶ 19 *Jour. Crim. Law* 376.

⁵⁵ See pp. 212-213.

⁵⁷ Brasol, *op. cit.*, p. 329.

The value of commitment to a hospital for a period of observation lies in the fact that it is practically impossible successfully to simulate insanity while under constant observation. The American Law Institute's code contains an alternative to section 318, already quoted. This alternative section is recommended for states having a public institution to which defendants may be conveniently committed for observation; it provides that when insanity or mental defect on the part of the defendant at the time of the act charged becomes an issue in the cause, the court shall either appoint experts to examine the defendant, "or shall commit the defendant to the proper institution for observation and examination."

"If the defendant is committed to a state institution," this section continues, "the court shall direct that the proper officer of such institution prepare a written report regarding the mental condition of the defendant in so far as this indicates what was his mental condition at the time of the alleged offense. Such officer shall be summoned as a witness at the trial and may be examined by the judge or by either party."

A more radical plan is that "the law should require that at the close of the observation period the commission shall render a complete report upon the mental condition of the accused," that the defense counsel have the right to cross-examine the commission, but that "the commission's report should be made *the only competent evidence admissible at the trial upon the insanity issue.*"⁵⁸ This is, in substance, the plan enacted in Louisiana in 1928, but promptly held unconstitutional.⁵⁹

Consultation of Experts. Another step toward the adoption of modern medical methods of diagnosis in criminal procedure would be to permit the experts called in a case to consult together, and submit a joint report, if they wish. The Expert Testi-

⁵⁸ H. B. Wilson, "The Insanity Plea" (1928), 62 *Am. Law Rev.* 579, 586.

⁵⁹ *State v. Lange* (1929) 168 La. 958, 123 So. 639. See p. 260.

mony Bill drafted by the American Institute of Criminal Law and Criminology originally contained a section which so provided, but this section was later eliminated.⁶⁰ More recently, the New York Legislative Crime Commission introduced a bill in the legislature of that state, one purpose of which was to organize the witnesses "into a scientific body or board, to analyze the defendant's mental condition, and determine that as a scientific problem in accordance with accepted scientific methods," and to eliminate controversy "through examination of the defendant by the expert witnesses jointly."⁶¹

Regulation of Compensation of Expert Witnesses. Not only the fees of experts called by the court, but of all experts called to testify, it has been urged, should be regulated by statute, so as to eliminate financial inducements to evolve fanciful deductions of mental disease.

Our code and statutes now restrict the rights of a litigant as to the production of his proof. They fix the qualifications and compensation and, in some cases, the number of ordinary witnesses and the form of direct-examination and cross-examination. The legislature has even a clearer right to regulate the selection and compensation of experts who are to give their opinions or conclusions, though many lawyers believe that the constitution has not allowed the legislature to take from a party the right to choose his own experts. . . . As litigants with most money at their command may get the greatest number of experts and the most expensive experts, the court should have the right: (1) to prescribe a list of eligible men, (2) to limit the number to be called, and (3) to fix the compensation. No witness in any case should have a contingent fee. He should not have his compensation depend upon the success of his testimony or his side. That is too great a temptation to partisanship.⁶²

⁶⁰ "Insanity and Criminal Responsibility" (Report of Committee A of the Institute, E. R. Keedy, Chairman) (1916), 7 *Jour. Crim. Law* 484.

⁶¹ Herbert L. Smith, "Psychiatric and Expert Testimony" (1930), 2 *N.Y. State Bar Ass'n Jour.* 99.

⁶² E. J. McDermott, "Needed Reforms in the Law of Expert Testi-

The model Code of Criminal Procedure, it will be noticed, provides that the fees of experts called by the court shall be fixed by the court, but it does not attempt to fix the fees of expert witnesses called by the parties.

Comment on the Evidence by the Judge. The trial judge could help materially to create a certain degree of order out of the confusion usually produced in the jurymen's minds by the abstruse profundity of the experts, if he had the power to sum up and comment on the evidence in the case. Unfortunately, this power has been taken from the courts in most states. In the report of the Missouri Crime Survey, it was said: "Nothing could more clearly show the need of giving the trial court the right to assist the jury in deciding as to the facts than the usual conduct and result in such a case. If the judge is restored to his former position of authority, the difficulties of the plea of insanity will be largely corrected."⁶³

Modification of Jury's Function. The suggestions above are all aimed at giving the jury the benefit of sound, unprejudiced expert opinion to aid them in passing upon the question of the defendant's sanity or insanity. Some authorities, however, have concluded that even with such expert assistance, the jury is incompetent to decide this question, and have therefore recommended that the question of mental condition be taken from the jury entirely, and be submitted to experts in psychiatry and penology. The competency of the jury, it has been said, is "little short of farcical."⁶⁴ "It is erroneous policy to place twelve men, selected at random, in the position of independent judges of facts whose nature, legal significance, and psycho-biological

mony" (1911), 1 *Jour. Crim. Law* 698, 700. See also White, *Insanity and the Criminal Law* (1923), p. 56.

⁶³ *Missouri Crime Survey* (1926), p. 373.

⁶⁴ Dr. R. B. Lamb, superintendent of Matteawan State Hospital, in an address on "Commitment and Discharge of the Insane Criminal" (1909), *New York State Bar Ass'n Reports*, vol. xxxii, pp. 60, 63.

effect they usually cannot comprehend. . . . The assumption that the jurors, because they are jurors, are capable of conceiving the intricate elements of psychic disorders—is an arbitrary inference and a legalistic atavism. The continued adherence to this backward theory is neither justified by science nor vindicated by the present-day confusion, arising from the whole problem of criminal responsibility in cases where insanity is pleaded.”⁶⁵

The jury, it has been widely recommended, should determine merely whether the defendant committed the physical act or not, and should not consider the question of punishment. If the jury finds that the defendant did the act charged, a careful study should be made of him, by psychiatric and sociological experts, to determine what should be done with him, in order (a) to rehabilitate him, if possible, and (b) to protect society. According as the experts find it appropriate, the defendant may be sent to a penal institution, so-called, or to a hospital for mental diseases, or paroled under proper supervision.⁶⁶

Four objections to this proposal to take the question of mental condition away from the jury have been enumerated by Professor Keedy: First, the proposal assumes that the present function of the jury is to decide simply whether the defendant is sane or insane; whereas the proper question for them is “whether the mental element required by law was present,” a question which the jury has to decide in every criminal case. The second obstacle is constitutional. The defendant has the right to a jury trial. One of the necessary elements of crime which the defendant has a right to submit to the jury is the presence of criminal intent. The third objection is that the proposal loses sight of the fact that criminal responsibility is a legal question. “The commission of

⁶⁵ Brasol, *op. cit.*, p. 330.

⁶⁶ Singer and Krohn, *op. cit.*, p. 414; *Illinois Crime Survey* (1929), p. 809; Address of Governor Alfred E. Smith, before the Crime Commission, Albany, Sept. 7, 1927; Ball and Kidd, “The Relation of Law and Medicine in Mental Disease” (1920), 9 *Calif. Law Rev.* 1.

experts is competent to decide whether the defendant is sane or insane, but in what respect is it fitted to determine whether the defendant is guilty of murder or larceny, as the case may be?" The fourth objection arises from the fact that criminal responsibility depends upon the state of mind at the time of the act, and not at the time of the trial. To determine the defendant's state of mind at the time of the act, the examination of witnesses is necessary. "The examination of witnesses by the commission would be a complete usurpation of the functions of judge and jury."⁶⁷

All these objections, it can be seen, rest upon one fundamental base—the concept of responsibility. As a matter of fact, the proposal constitutes part of a revolutionary program of reform, which would abolish this ethico-legal and quasi-religious conception entirely. This program of the "positivist" school will be discussed later.⁶⁸

Another objection to the plan, based upon scientific rather than legal grounds, has been offered by M. Hamblin Smith, English criminologist, who deprecates the scheme for the reason that "examinations made just after conviction are apt to be most misleading. . . . It is of the first importance that mental examination should be made before final trial and sentence."⁶⁹

Dr. Glueck has suggested that the question of the defendant's mental condition be taken away from the jury entirely, but that after conviction an administrative commission or other instrumentality might be employed, "to determine the appropriate socio-penal treatment adequate to the individual delinquent, as well as its duration." Such a provision, he points out, would not violate the defendant's right to trial by jury, "for the jury could still pass upon the mental element of the crime—the *mens rea*—

⁶⁷ Keedy, "Insanity and Criminal Responsibility" (Report of Committee B of the Institute) (1911), 2 *Jour. Crim. Law* 521, 528.

⁶⁸ See p. 435.

⁶⁹ Smith, *The Psychology of the Criminal* (1922), p. 168.

but the work of scientific determination of the *peno-correctional consequences of conviction* by a jury, would be lodged in a skilled, administrative board specially qualified for such a task."⁷⁰

Abolition of the Defense of Insanity. Closely akin to the proposals above is that of eliminating the defense of insanity in criminal trials entirely. The legislature of the state of Washington, in 1909, passed a law providing that insanity shall be no defense to a charge of crime. Another section provided that if in the judgment of the court, a defendant was irresponsible at the time of the act, or insane at the time of the trial, the court in its discretion might order the defendant confined in the state hospital until recovered. The statute was promptly held unconstitutional by the supreme court of the state.⁷¹

A somewhat similar proposal was offered by the New York State Bar Association in 1910,⁷² but withdrawn in 1911, after the Washington court had held the statute of the state unconstitutional.⁷³

More than a decade after the Washington decision, Mr. Curtis D. Wilbur, then Associate Justice of the Supreme Court of California, offered the following proposal:

That insanity be no longer treated as a defense to a criminal charge, and that evidence on that subject be excluded from the jury trying a criminal case; that after conviction the defendant upon suggestion of insanity, be examined by a board of alienists with a view to determining whether the defendant should be committed to the state hospital,

⁷⁰ Glueck, *op cit.*, pp. 485-486. The American Bar Association, in a resolution adopted in 1929, recommended "that no criminal be sentenced for any felony in any case in which the judge has any discretion as to the sentence until there be filed as a part of the record a psychiatric report." *Am. Bar Ass'n Reports* (1929), vol. 54, p. 56.

⁷¹ *State v. Strasburg* (1910) 60 Wash. 106, 110 Pac. 1020.

⁷² *New York State Bar Ass'n Reports* (1910), vol. xxxiii, pp. 391, 401, *et seq.*

⁷³ *Ibid.* (1911), vol. xxxiv, p. 274.

or prison, or be released under probationary supervision to private hospital or to other custody; that the judge be empowered to make such supervisory orders from time to time upon the advice of competent alienists as may be necessary, and that the state retain jurisdiction over the defendant even after an apparently complete cure for at least as long as the maximum term of imprisonment for the offense, resuming custody of the defendant during that period whenever symptoms of a relapse make further custody desirable for the protection of the public.⁷⁴

A measure very similar to this proposal was enacted in Mississippi in 1928, but was held unconstitutional.⁷⁵ The Mississippi act applied only to murder cases. It abolished insanity as a defense to murder, and provided that if the jury find the defendant guilty but insane, they must fix his penalty at life imprisonment, and the court, in its discretion, may certify that the defendant's mental condition is such that he should not be confined in the penitentiary, whereupon the governor, after an examination, may order the prisoner confined in an insane institution instead of in the penitentiary.

Here again the concept of responsibility arises to trouble us. To the criminologist, it makes little difference whether the offender is sane or insane, for in either case he is a menace to society and should be put under control and treatment. To the law, however, there is a sharp difference between the two. The man who commits a socially harmful act while suffering from a legally recognized degree of mental disorder is regarded as unfortunate, morally and legally blameless, but requiring confinement for his own safety and the safety of society. But the person who commits such an act while sane is "criminally responsible"; he is "guilty" and deserving of punishment. It matters not that the distinction between hospital "treatment" and prison "punish-

⁷⁴ Wilbur, "Should Insanity Defense to Criminal Charge be Abolished?" (1922), 8 *Am. Bar Ass'n Jour.* 631, 633.

⁷⁵ *Sinclair v. State* (1931) 161 Miss. 142, 132 So. 581.

ment" is diminishing, and that both are rapidly becoming correctional in purpose; the sane offender is still distinguished from the insane by the stigma of moral and legal "guilt." Any attempt to disregard this distinction, and to put the insane offender in the same category with the sane, as in the Mississippi act, is unconstitutional, according to present-day concepts.

Burden of Proof. In about half of the American states, as we have seen, the defendant has the burden of convincing the triers of the facts of his irresponsibility, i.e., that at the time of the act charged, he was so mentally disordered as not to have known right from wrong with respect to that particular act (or, in some states, suffering from such an insane irresistible impulse as not to be able to resist doing it). Dr. Oppenheimer suggests the following change in the burden of proof rule: "Whilst the most definite proof should be required of the existence of mental disease, when once it has been established that the prisoner is a lunatic, the present presumption of law should be reversed; and those proved to be of unsound mind should be assumed until the contrary be shown, not to know the nature and quality of their acts and that that which they were doing was wrong."⁷⁶

"Thus," says Professor Ballantine, in commenting on this suggestion, "it need not be positively proved that the defendant was not able to distinguish right from wrong, or that his ignorance extended to the very act of which he is accused. If the evidence exhibits morbid impulses; if the will is weakened; if the intelligence is of low grade; if there are delusions, obsessions, or other symptoms of mental disease, this evidence may raise a presumption of such disturbance of the mental and volitional faculties as to exclude intelligent choice of conduct."⁷⁷

In effect, this suggestion seems to be the same as the rule already in force in almost half the American states, namely, that

⁷⁶ Quoted by Ballantine, "Criminal Responsibility of the Insane and Feeble-minded" (1919), 9 *Jour. Crim. Law* 485, 495.

⁷⁷ *Ibid.*, *loc. cit.*

in the absence of evidence to the contrary, all persons are presumed to be sane, but that if evidence sufficient to raise a reasonable doubt on the matter is introduced, the ultimate burden of convincing the jury that the defendant is sane within the legal test of responsibility is on the prosecution.

§5. PROCEDURE FOR COMMITMENT AND DISCHARGE OF PERSONS ACQUITTED BY REASON OF INSANITY

Special Verdict. If the jury acquits a defendant on the ground of insanity, a special verdict of "not guilty by reason (or because) of insanity" is now required in almost every state.⁷⁸ It has been suggested, however, that this form be given up in favor of the English verdict of "guilty but insane," the object of the change being to give the state a basis for restraining such a defendant without right to *habeas corpus*.⁷⁹ On the other hand, in England it has been proposed that the "guilty but insane" verdict be given up in favor of the American form.⁸⁰

Procedure on Acquittal. "Incarceration for at least some period

⁷⁸ See p. 262.

⁷⁹ *New York State Bar Ass'n Reports* (1911), vol. xxxiv, p. 278. This suggestion was offered by a committee of the New York State Bar Association at the time when the notorious Harry Thaw case occupied public attention. Thaw, having been acquitted of murder on the ground of insanity, attempted to win his freedom from the asylum by repeated writs of *habeas corpus*. "The only point we urge for consideration," the committee concluded, "is, that a man who has done an evil deed ought not to be acquitted, but found guilty, and if insane, he should be sentenced to an asylum. Being under sentence, he would have no right to a writ of *habeas corpus*, and could only be set free by pardon. Thus the judicial farce, of murderers being acquitted by reason of insanity, and set free on account of sanity, would be ended." 1 *Jour. Crim. Law* 129.

⁸⁰ The report of the Committee on Insanity and Crime (1923), said: "This [verdict of 'guilty but insane'] seems to us illogical. The verdict is one of acquittal. An accused cannot be 'guilty' of a physical act which is not in itself an offense. The word 'guilty' in criminal trials should connote only criminality, the commission of a crime—the very thing which on the finding of the accused's state of mind is negated. . . . The spe-

after acquittal sufficient, at least, for the acquitted person to be subjected to thorough psychiatric observation and examination," says Dr. Glueck, "in a hospital for the mentally ill is, it seems to us, highly desirable."⁸¹ This is provided for in some states; in others, the court has discretion to determine whether a person so acquitted should be committed to a hospital or not.

Dr. Austin Flint, a noted alienist, has suggested⁸² that upon commitment by the court of a defendant (at any stage of the criminal proceedings), a report of the complete medical history of the case should accompany the order, to be incorporated by the hospital authorities in the case-book. He also recommends that if the defendant is committed upon an acquittal by reason of insanity, or by reason of his present insanity at the time of the criminal proceedings, the court should direct that the medical record of such person be sent to the hospital, and that the superintendent of the hospital be required to report to the court, within six months, on the mental condition of such person, and thereafter at intervals of not more than six months each.

Provisions for Discharge on Recovery. Prisoners should be released upon parole or discharged, it has been recommended, "only after complete and competent psychiatric examination with findings favorable for successful rehabilitation."⁸³ Indeed, it has been said that no patient of a hospital for the criminal insane should be discharged unconditionally, but that "there should be guardian societies formed for the express purpose of watching over discharged patients to see that they are placed in

cial verdict should be "That the accused did the act (or made the omission) charged, but is not guilty on the ground that he was insane so as not to be responsible according to law at the time." Quoted by Glueck, *Mental Disorder and the Criminal Law* (1925), p. 471.

⁸¹ Glueck, *op. cit.*, p. 437.

⁸² (1911) 2 *Jour. Crim. Law* 112.

⁸³ This was one of the recommendations of the American Psychiatric Association, as reported by Menninger, "Medicolegal Proposals of the American Psychiatric Association" (1928), 19 *Jour. Crim. Law* 367, 376.

proper environment and that their situation is such that there shall be no incentive to return to crime."⁸⁴ Societies for the after-care of prisoners are already in existence; there would seem to be at least an equally fertile field in the after-care of those who have been confined as criminally insane.

The abuse of the writ of *habeas corpus* is the chief problem in dealing with the procedure for discharge.⁸⁵ A few states, notably California and Indiana,⁸⁶ have restricted the frequency with which applications for release may be made. Dr. Glueck has proposed a somewhat more comprehensive statutory provision along this same line to read as follows:

When anyone is in custody, in a state hospital for the criminal insane, after a verdict of "insane and irresponsible offender," an application may be made in his or her behalf for a writ of *habeas corpus*, to any court or judge authorized by law to grant the same. But the first application shall not be made until after the inmate of such hospital has resided therein for at least two years, and subsequent applications shall not be made oftener than once in every two years, unless the permission of the superintendent of said hospital for such first or subsequent applications shall be first obtained in writing. Such applications shall only be made upon a written, verified petition, accompanied by a certificate made under oath by two qualified medical examiners in insanity. The certificate shall indicate that the examiners have made a careful examination of the person in custody, and of the official record at the hospital covering such person's case, giving the time and place of such examination, and that in their opinion it is reasonably certain that the person in custody has not only recovered his mental health but may be released with safety to himself and others; and such certificate shall also state the facts upon which the opinion of the examiners is based. Provided, that as to the first appli-

⁸⁴ Dr. F. Robertson, "The Problem of the Criminal Insane from the Viewpoint of the Physician" (1914), 4 *Jour. Crim. Law* 749.

⁸⁵ For a number of cases in which the writ was obviously abused, see White, *Insanity and the Criminal Law* (1923), chap. x, "A Chapter of Blunders."

⁸⁶ See *ante*, p. 282.

cation for the writ by any person in custody in the state hospital for the criminal insane, any court or judge authorized by law to grant such application may, if to his satisfaction probable cause has been made out therefor, grant the writ without requiring the certificates of experts as hereinbefore provided.

The superintendent of the state hospital for the criminal insane, or other delegated officer of such institution, may, in his discretion, make an order, either denying the application or directing that the writ issue. Should the order direct that the writ issue, the subsequent proceedings in the case of the first application for such writ shall be with or without a jury in the court's discretion, and the subsequent proceedings in the case of the second or subsequent applications for such writ shall be with or without a jury in the relator's discretion.

In all cases of release of persons declared and found to be sane and safe to be at large, release shall be probationary for such time and under such conditions, including periodic report at a state clinic for mental disease, or to an approved psychiatrist, as the court or the judge, in its or his discretion, may order; and no release shall be permanent until after the entry of an order by the court or judge to that effect.⁸⁷

This act, Dr. Glueck feels, would be sufficient to cover the situation, but if supplementary legislation is desired, he recommends the Washington provision for recommitment if the person again becomes insane after discharge, supplemented by the New Mexico practice of regular periodic reports by the hospital superintendent to the proper judge, of the mental condition of all inmates.⁸⁸

§6. FUNDAMENTAL REFORMS OF CRIMINAL LAW

Abolition of Concept of "Responsibility." Any discussion of the reforms necessary in the trial of persons whose mental condition is in question leads inevitably to a consideration of wider reforms, going to the very foundations of our criminal juris-

⁸⁷ Glueck, *op. cit.*, p. 491.

⁸⁸ *Ibid.*, p. 493.

prudence. This is especially true in dealing with the tests of responsibility. Before we can decide whether a person suffering from mental disorder should be held responsible for his criminal acts, we must define "responsibility." What do we mean when we say a man is criminally responsible or irresponsible, and what purpose does this concept serve?

Criminal responsibility means punishability. It means that the person is blameworthy; he has knowingly and voluntarily done an evil deed, and therefore he deserves to suffer. The concept of responsibility is based upon the hypothesis that all men are free moral agents, with certain exceptions, such as infants and insane persons, who, because they are not free moral agents, are not responsible for their acts. This conception was not a factor in early law, nor in the classical criminology of Beccaria. It became of primary importance only in the neo-classical school of the French Revolution.⁸⁹

During the past hundred years, there has arisen what is usually called the "positivist" school of criminology, which would disregard the neo-classical concept of responsibility, and make the metaphysical question of the existence of "free moral agency" or "freedom of will" unimportant. This view has been stated by Dr. H. Douglas Singer:

From a practical point of view, does it make any real difference whether we label a man responsible or irresponsible? Would it be not equally pragmatic to hold everyone responsible for his acts, whether sane or insane, and then to adopt measures that will: (1) insure society against further criminal acts on the part of this person; (2) establish clearly that society cannot, for its own protection, tolerate such acts regardless of the reasons back of them, and (3) rehabilitate the offender if that is possible. These purposes are all that are hoped for from punishment; the introduction of the mythical concept of responsibility merely clouds the issue.

Thus, from the psychiatrist's point of view, the question is not one

⁸⁹ Sutherland, *Criminology* (1924), p. 334 *et seq.*

of abolishing responsibility, but of ignoring it, and of planning treatment to fit the offender rather than his offense.⁹⁰

So, too, Dr. William Healy, whose work with juvenile delinquents has made him an outstanding authority on the subject, has said:

If responsibility has been, as Tarde asserts, the pivot upon which penal philosophy has heretofore revolved, then it seems clear that what has been called penal philosophy should be replaced by something much more human, more economic in the long run, and more efficient for reformation.⁹¹

The attitude of the criminologist has been further explained by Dr. William A. White:

The principles of criminology dictate that the criminal and not the crime should be the matter of prime consideration and that the sentence, or better the decision of the court, should be calculated to cure the social illness as it has been shown to exist in the conduct of the defendant. The situation is analogous to the relation between physician and patient only that here the disease is not individual but social and the place of the physician is taken by the state. Under the operation of these principles a defendant who was only charged with a minor offense might well have to spend the rest of his life more or less restricted in his liberty if an analysis of his make-up and a study of his behavior showed that he never sufficiently improved or profited by his experience to warrant discharge as a free citizen into the community. In the same way a person who had committed a serious offense might be ultimately discharged after a comparatively brief internment. It is the same here as in the practice of medicine. All cases of pneumonia are not treated alike just because the disease happens to be labeled pneumonia. The patient is treated and allowances made for age, previous condition of health, concurrent diseases of organs other than the lungs, power of resistance, etc. The patient is treated and not the disease and it is as illogical to sentence a person

⁹⁰ Quoted by Wigmore, in *Illinois Crime Survey* (1929), p. 743.

⁹¹ Healy, *The Individual Delinquent* (1915), p. 20.

who has committed a certain offense to a specific term of imprisonment as it would be to decide when a patient is admitted to a hospital the day upon which he shall be discharged.⁹²

The Abolition of Punishment. The primary aim in the positivist program is to substitute treatment of the criminal for punishment. Punishment as such would have no place in the positivist scheme of things.

This, of course, would be a radical departure from the present accepted point of view, in which some form of punishment is taken for granted as the natural and necessary prescription for crime. The uncritical acceptance of the institution of punishment by the man in the street is probably attributable to the fact that "historically, punishment has been developed from the instinct of revenge or retaliation."⁹³ When the state first took over the punishment of wrongdoers, either as a substitute for private vengeance, or at least as an alternative, to which the wronged party might resort, if he chose, the state, in order to be granted the right to act, had to satisfy the passion of the individual and of the community for revenge. Even in our modern law, punishment is an outlet for this vindictive instinct. As Sir James Stephen put it: "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."⁹⁴

Philosophers, however, have tried to find a philosophical explanation and justification for punishment. Their theories can be divided into two groups: the theories of retribution, and the theories of deterrence. The retribution theories agree in considering punishment an end in itself; "he who sins must suffer" is a metaphysical law, governing the universe. Thus Kant held that

⁹² White, *Insanity and the Criminal Law* (1923), p. 149.

⁹³ Höffding, "The State's Authority to Punish Crime" (1911), 2 *Jour. Crim. Law* 691.

⁹⁴ Stephen, *History of the Criminal Law of England* (1883), vol. ii, p. 81.

punishment is a categorical imperative, required by the moral law. Hegel argued that punishment is logically a necessary complement of crime. Others have said that punishment is a theological necessity, and a divine duty; or an aesthetic necessity, to resolve the discord which crime creates, and satisfy our inner urge for harmony.

Stripped of their ponderous metaphysical terminology, these retribution theories appear as mere armchair sublimations by kindly and intellectual philosophers of a primitive and vindictive law—an eye for an eye and a tooth for a tooth. They have today been given up by most jurists, in favor of the theories of deterrence. There are several of these, also, but they resemble each other, and differ from the retribution theories, in this—that they justify punishment not as an end in itself, inflicted simply as a necessary consequence of crime, but only in so far as it tends to protect society. There are four varieties of the deterrence theory: (1) the theory of example, according to which punishment is necessary, in order to deter others from committing the same crime; (2) the theory of reformation, which assumes that punishment makes men good; (3) the theory of disablement, which looks upon punishment as a means of preventing the criminal from offending again, by either executing him, and so removing him completely, or by incarcerating him, and so removing him from society for a time at least; (4) the theory of prevention, which considers the threat of punishment the important thing, serving to deter all persons from committing the punishable act; punishment is actually inflicted only to show that the threat is effective.⁹⁵

Reflection must show us that as a cure or preventive for criminal conduct, punishment has proved far from satisfactory. More-

⁹⁵ For a full discussion of the various conceptions of punishment, see Oppenheimer, *The Rationale of Punishment* (1913); Kenny, *Outlines of Criminal Law* (13th ed., 1929), chap. vi; McConnell, *Criminal Responsibility and Social Restraint* (1912).

over, it entails certain evils, so serious that it may be questioned whether they do not outweigh whatever social good the punishment may accomplish.

These evils have been discussed by Sutherland, who found that punishment "is a relatively inefficient method of dealing with criminals," because it (1) makes the criminal hate society; (2) develops caution; (3) creates other undesirable attitudes; (4) often makes crime more exciting; (5) can produce only fear, while reformation must be a constructive process; (6) generally stops constructive effort.⁹⁰

The statement that the positivists would abolish punishment as such must not be misunderstood. This does not mean that they would abolish all unpleasant forms of dealing with criminals. No doubt there are cases in which disciplinary measures are necessary and beneficial; and with incorrigible or incurable offenders, indeterminate incarceration may be the only thing possible. The point is that the criminologist would inflict hardship and suffering only in so far and in such cases as they tend to confer a benefit, and not for their own sake. Penal discipline and incarceration, like surgical operations and quarantine, would be things unpleasant to endure, but inflicted upon persons because necessary for their own well-being or for the well-being of society, and not as punishment for their transgressions.

It is true that a wide range of reforms have been enacted, looking to the education and rehabilitation of prisoners. But these older methods have simply been engrafted upon the older conception of the purpose of punishment, leaving a result that is illogical and contradictory.

A bit at a time, conflicting policies have been introduced—reformatories, education in prisons, probation and parole, juvenile courts,

⁹⁰ Sutherland, *Criminology* (1924), p. 342 *et seq.*

specialized courts, psychopathic laboratories connected with courts and various other things. Even while orthodox theorists were loudly demanding the policy of punishment, that policy was, without their knowledge, being supplanted. And as these competing policies have been introduced, it has appeared that some of them are more successful than the punitive procedure of earlier days.⁹⁷

The two policies are flatly contradictory, and an attempt to combine them is hopeless, as George Bernard Shaw has illustrated:

To propose to punish and reform people by the same operation is exactly as if you were to take a man suffering from pneumonia, and attempt to combine punitive and curative treatment. Arguing that a man with pneumonia is a danger to the community, and that he need not catch it if he takes proper care of his health, you resolve that he shall have a severe lesson, both to punish him for his negligence and pulmonary weakness and to deter others from following his example. You therefore strip him naked, and in that condition stand him all night in the snow. But as you admit the duty of restoring him to health if possible, and discharging him with sound lungs, you engage a doctor to superintend the punishment and administer cough lozenges, made as unpleasant to the taste as possible so as not to pamper the culprit.⁹⁸

Our criminal jurisprudence today presents a patchwork pattern of these competing theories. Specific reforms have been enacted into law, but the underlying conception which inspired these reforms has not usually been given much thought, and has certainly not been accepted as the basis of our methods of dealing with offenders. "All theories on the subject of punishment," said Sir Henry Maine in 1864, "have more or less broken down; and we are at sea as to first principles." In 1925, Lord Oxford, quot-

⁹⁷ *Ibid.*, p. 351.

⁹⁸ Webb, *English Prisons under Local Government*, Preface by G. B. Shaw (1922), p. xiv.

ing these words, added, "Nothing has since been said or written that has brought us any nearer to these principles."⁹⁹

Certainly the idea that the state should frankly give up punishing people who transgress the law, and treat them as social problems rather than as sinners, still sounds to most people like the wildest of anarchistic notions. We are rapidly putting the conception into practice, but we are still a long way from admitting or even realizing that we are doing so. Nevertheless, the new point of view is growing in popularity. It has already been adopted in Mexico¹⁰⁰ and the U.S.S.R.¹⁰¹

This new attitude toward crime and criminals is without a doubt the most revolutionary development in penal philosophy since Beccaria, and indications are that it will eventually enjoy general acceptance. Indeed, we are even now rapidly approaching the day when we shall be using all the aids that science affords us to diagnose in each case the cause of the criminal conduct and the proper treatment to be applied, psychiatric, sociological, educational, or disciplinary.

⁹⁹ Quoted by Kenny, *Outlines of Criminal Law* (13th ed., 1929), p. 513.

¹⁰⁰ The new Mexican code abolishes the very word "punishment." "It is inspired," says Professor Salvador Mendoza, "by the conception that society does not need to be angry and to be bitter against criminals in order to keep the welfare of the community. In drafting this new penal code we did not need to go, however, so far as to establish that all of the criminals are sick people, as some of the observers of the Mexican criminology have asserted. It was enough to assume, that criminals are dangerous beings for the common interests of society, for dealing with the problem. Nevertheless, it seemed to us that society would have a better chance to combat the evil of crime, if it could acquire something like the coldness and simplicity of physicians and surgeons when they cut and cure." Mendoza, "The New Mexican System of Criminology" (1930), 21 *Jour. Crim. Law* 15.

¹⁰¹ "The measures of social defense shall not aim at punishment or retaliation; they shall be expedient; they shall not humiliate human dignity and aim at the infliction of useless and superfluous suffering." Art. 6, Draft of the General Part of the Penal Code.

When this attitude is adopted toward all offenders, the present problem of distinguishing between the "sane" and the "insane" will be largely taken from the shoulders of lawyers, judges, and jurymen, and placed on those of persons more competent to deal with it, the psychiatrists, penologists, and criminologists.

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